Supreme Court U.S.
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RESPONSE REQUESTED

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 87-6997

EUGENE JOHN CARELLA, APPELLANT

v.

PEOPLE OF THE STATE OF CALIFORNIA, APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT,
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

MOTION OF APPELLEE TO DISMISS

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EDITOR'S NOTE:

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IN THE

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OCTOBER TERM, 1988

NO. 87-6997

EUGENE JOHN CARELLA, APPELLANT

v.

PEOPLE OF THE STATE OF CALIFORNIA, APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

MOTION OF APPELLEE TO DISMISS

The appellee moves the Court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are either so unsubstantial as not to need further argument or they have not been properly raised or passed upon. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari should be denied.

STATE STATUTES INVOLVED

The appeal is taken chiefly upon the ground that the appellate court had sustained the validity of two state statutes: California Penal Code section 484, subdivision (b) and California Vehicle Code section 10855.

California Penal Code section 484, subdivision (b) provides:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or

registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Vehicle Code section 10855 provides:

Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

STATEMENT

This is an appeal from the judgment entered on February 3, 1988, by the Appellate Department of the Superior Court, State of California, County of Los Angeles (hereinafter referred to as "appellate court"), 1/ which affirmed appellant's conviction after a jury trial of the charge of having violated California Penal Code section 487, subdivision 3 (grand theft of an automobile). 2/

Appellant's prosecution and conviction of grand theft of an automobile was based upon his failure to return a vehicle leased by him on March 26, 1985 and to be returned by him by May 3, 1985. The vehicle was not recovered by the police until June 27, 1985, despite unsuccessful efforts by the lessor to

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1. A copy of the Memorandum Judgment of February 3, 1988 is attached in the Appendix at App 1-3. A copy of the appellate court's Order Denying Defendant's Petition for Rehearing and Application for Transfer, filed on February 24, 1988, is attached in the Appendix at App 4.

We concede that the appellate department's judgment is a final judgment within the meaning of 28 USC § 1257. Defendant petitioned for rehearing and applied for transfer to the Court of Appeal of the State of California. (See Rules 61, 62, 107, California Rules of Court.) Such petition and application having been denied, the Appellate Department of the Superior Court of Los Angeles County becomes the highest court of the State.

2. This section, pertinent in relevant part: "Grand theft is theft committed in any of the following cases:. . . . 3. When the property taken is an automobile. . ." Section 489 provides: "Grand theft is punishable by imprisonment in the county jail for not more than one year or in the state prison." On April 8, 1988, the trial court suspended the imposition of sentence, placed appellant on formal probation which included that he serve six months in the county jail.

contact appellant about the vehicle. 3/ Appellant urged the unconstitutionality of the statutory presumptions contained in Penal Code section 484, subdivision (b) and Vehicle Code section 10855 at the trial court level. He also objected to two jury instructions embodying these statutory presumptions which were requested by the prosecution. 4/

One ground of appellant's appeal from his judgment of conviction was the "[trial] [c]ourt's refusal to dismiss the Complaint and declare the statutory presumptions contained in Section 10855 of Vehicle Code and 484 of the Penal Code unconstitutional, constitutes an abuse of discretion and reversible error." (App 6-7.) Appellant urged in the appellate court that the instructions embodying the statutory presumptions in question were unconstitutional. 5/ Appellant, although he did not expressly specify that the statutory presumptions and the jury instructions embodying them violated the Constitution of the United States, nevertheless cited People v. Hemmer, 19 Cal.App.3d 1052, 97 Cal.Rptr. 916 (1971) and People v. Hedrick, 105 Cal.App.3d 166, 164 Cal.Rptr. 169 (1980), and described them as expressly holding that the statutory presumptions in question violated the due process clause of the Fourteenth Amendment. (App

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3. The Settled Statement on Appeal, as approved by the trial court and reviewed by the appellate court, is included in the Appendix at App 5-13.

4. The jury instructions are included in the Appendix at App 72-108.
The first "presumption" instruction read: "Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented." (App 105.) The second jury "presumption" instruction read: "Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be [illegible] vehicle." (App 106.)

5. Appellant's argument to the appellate court is contained in pages 23-25 of his brief, which is included in the Appendix at pages App 40-42. See also App 22-23, 25, 32, and 36 (numbered pages 5-6, 8, 15, and 19 of the brief) for other statements concerning the presumptions or instructions based on them. Appellant did not appear for oral argument before the appellate court. (See App 16.)

41-42 (pages 24-25 of Appellant's Opening Brief.) We assume that such argument satisfies the jurisdictional requirement of 28 USC § 1257 that a federal constitutional question has been properly raised. (STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE (6th ed.) 153-155.)

The appellate court, although not expressly referring to the Federal Constitution, concluded that the jury instructions embodying the presumptions in Penal Code section 484, subdivision (b) and Vehicle Code section 10855 did not constitute error. (App 1-2.) We assume that the appellate court's holding satisfies the jurisdictional requirement of 28 USC § 1257 that the federal question purportedly raised by appellant was passed upon by that court. We also assume that the appellate court implicitly upheld the validity of these statutes under the Federal Constitution, and that the instant appeal properly lies with respect to the two statutes in question. (STERN, GRESSMAN & SHAPIRO, supra, at 158-160.)

Appellant's questions I, II, III, IV, V, and VII in the Jurisdictional Statement pertain to the statutory presumptions. The only issue raised, however, in the appellate court by appellant pertaining to the jury instructions embodying the statutory presumptions was that he was deprived of the right to have the jury resolve factual issues relating to all elements of the offenses charged. (App 40-42 (pages 23-25 of Appellant's Opening Brief).)

Question VI pertains to Vehicle Code section 10855 6/ and essentially contends that it is constitutionally void for vagueness with respect to the terms "owner" and the place or location to which the property is to be returned. The question was not properly raised or passed on in the court below. Hence, [illegible] requirement of 28 USC § 1257 has not been satisfied.

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6. Appellant erroneously refers to section 10851. The text of Question VI, on page 3 of the Jurisdictional Statement, clearly indicates that appellant means section 10855.

Question number VIII, stated at page 3 of the Jurisdictional Statement, raises an issue concerning the impairment of the obligation of contracts which was never addressed to or by the appellate court. Hence, it pertains to a federal question not properly raised and, therefore, the jurisdictional requirement of 28 USC § 1257 has not been satisfied with respect to it.

Question number IX pertains to a claim that appellant's right to a speedy trial under the Fourteenth Amendment was violated. (See Jurisdictional Statement, at 4, 11-12.) One of the grounds of his appeal was that he had "never waived his right to a speedy trial at any time and no consent express or implied as defined in [California] Penal Code § 1382 exists in the record." (App 37 (page 20 of Appellant's Brief).) His argument on the matter is brief, does not purport either expressly or impliedly to rely upon federal constitutional grounds, and is based solely upon state statutory grounds. (App 44 (page 27 of Appellant's Opening Brief).) Moreover, the appellate court simply disposed of the issue by stating: "the [trial] court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights." (App 2.) Clearly, the jurisdictional requirement of 28 USC § 1257 has not been satisfied with respect to the speedy trial issue.

Question number X of the Jurisdictional Statement pertains to a Fourteenth Amendment claim of error based upon a failure to accord appellant's right to a reporter's transcript of trial evidence. (Jurisdictional Statement, at 4-5. See also Id., at 23-25.) Whatever the merits of this claim, it was not presented to the appellate court by appellant in his brief. According to California law, a failure to brief an issue mentioned as a ground in a notice of appeal is deemed to have been abandoned. (People v. Tanner, 24 Cal.3d 514, 518 n. 2, 156 Cal.Rptr. 450, 596 P.2d 328 (1979).) Hence, the jurisdictional

requirement of 28 USC § 1257 as to this issue has not been satisfied. 7/

Question number XI in the Jurisdictional Statement pertains to appellant's claims based upon the failure of the trial and appellate court judges to disqualify themselves. (Jurisdictional Statement at 5. See also Id. at 15-16, 25-28.) Appellant's Brief recites some matter concerning disqualification of the trial and appellate court judges. (App 24-25, 37, and 44-45 (pages 7-8, 20, and 27-28 of Appellant's Brief).) His "argument" consists only of the caption: "THE TRIAL COURT'S REFUSAL TO ACT UPON APPELLANT'S DISQUALIFICATION PETITION CONSISTENT WITH LAW CONJOINED WITH PREJUDICE AND ANIMOSITY DIRECTED AT APPELLANT DENIED APPELLANT FAIR TRIAL GUARANTEED BY THE 14TH AMENDMENT." (App 44-45 (pages 27-28 of Appellant's Brief).) According to California law, where a point is merely asserted by counsel, without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion. (People v. Callegri, 154 Cal.App.3d 856, 865, 202 Cal.Rptr. 109 (1984). Hence, the jurisdictional requirement of 28 USC § 1257 with respect to this claim has not been satisfied. 8/

Question number XII of the Jurisdictional Statement pertains to the trial court's alleged refusals to grant appellant arraignment on misdemeanor sentencing, pre-sentencing probation

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7. Appellant's Petition for Rehearing and Application for Transfer, which in included in the Appendix at App 47-81, sought rehearing or transfer upon the ground that he was deprived of the right to have a transcript of the proceedings in the trial court. However, nowhere did appellant base his claim, whether expressly or impliedly, upon federal constitutional grounds. Moreover, the appellate court's denial of the petition for rehearing and application for transfer did not address any federal question. (App 4.) It should be noted that the petition for rehearing and application for transfer in large part complains of the failure of the appellate court to grant appellant's motion for a transcript which was filed on January 20, 1988, some after briefing and oral argument.

8. The memorandum of points and authorities in support of appellant's Petition for Rehearing and Application for Transfer refers to a motion for disqualification of the judges of the appellate court on or after February 4, 1988. (App 65.) There is no federal constitutional question raised, expressly or impliedly, and the appellate court's denial did not address the issue.

report and hearing, and to permit appellant reasonable bail or release on his own recognizance pending appeal. (Jurisdictional Statement, 5-6. See also 22-23.) Appellant's Brief refers to this matter. (App 30-34 (pages 16-19 of Appellant's Brief.) His "arguments" on these issues are as follows:

"THE TRIAL COURT'S REFUSAL TO STAY JUDGMENT AND SENTENCING AND REMANDING APPELLANT FOR IMMEDIATE INCARCERATION, DESPITE DEMAND THAT JUDGMENT AND SENTENCING BE STAYED PENDING APPEAL VIOLATES THE SUPREME COURT MANDATE ANNOUNCED IN RE BAKKE. _____ 42 Cal.3d 84, and Appellant's Due Process Constitutional Guarantees" (App 44 (page 27 of his brief)); and "THE TRIAL COURT'S REFUSAL TO AFFORD APPELLANT A PRE-SENTENCING PROBATION REPORT, OR PROBATION HEARING, DESPITE DEMAND FOR SAME, DENIED APPELLANT EQUAL PROTECTION AND DUE PROCESS OF LAW." (App 45 (page 28 of brief.)

Here, appellant again failed to ground his claims upon the Federal Constitution. The appellate court's disposition of these issues do not refer to federal constitutional law. (App 2.) The jurisdictional requirements of 28 USC § 1257 are thus not satisfied with respect to Question number XII.

It is clear from the foregoing that the instant appeal arguably satisfies the jurisdictional requirement of 28 USC § 1257 only with respect to appellant's contentions concerning the statutory presumptions in California Penal Code section 484, subdivision (b) and Vehicle Code section 10855. Therefore, the appeal should be dismissed as to all other contentions.

ARGUMENT

Our position concerning appellant's contentions concerning the statutory presumptions in question are quite simple: (1) The a[illegible] finding no error insofar as the statutory presumptions are taken to be only presumptions affecting the burden of producing evidence. (2) Assuming that the trial court erred in giving the instructions

without indicating that the presumed intent is permissive, such error was harmless beyond a reasonable doubt.

1

THE STATE PRESUMPTION STATUTES ARE PER SE VALID

The appellate court declared that the presumptions embodied in the relevant statutes "are presumptions affecting the burden of producing evidence. (See People v. Hemmer (1971) 19 Cal.App.3d 1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. (See People v. Hedrick (1980) 105 Cal.App.3d 166, 170.)" (App 1-2.) 9/ Such statutory presumptions are not violative of the Federal Constitution. As this Court declared in Ulster County Court v. Allen, 442 U.S. 140, 157 n.16, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979): "To the extent that a presumption imposes an extremely low burden of production - e.g., being satisfied by 'any' evidence - it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." 10/ This Court has declared: "A permissive inference violates the Due Process Clause only if the

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9. California Evidence Code section 603 provides: "A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." Evidence Code section 604 provides: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. This section shall be construed to prevent the drawing of any inference that may be appropriate."

10. But see this Court's remark in Francis v. Franklin, 471 U.S. 307, 314 n.3, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985): "We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question."

suggested conclusion is not one that reason and common sense justify in the light of the proven facts before the jury." (Francis v. Franklin, 471 U.S. at 314-315.) Hence, the appellate court did not err insofar as it is taken to have implicitly held that the two presumption statutes are valid under the Federal Constitution.

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ANY INSTRUCTIONAL [illegible] CONCERNING PRESUMPTIONS WAS HARMLESS BEYOND A REASONABLE DOUBT

A determination that the two California statutes are constitutional does not, however, answer the question whether the trial court erred in instructing the jury with respect to the presumptions embodied in the statutes. The trial court instructions pertaining to the statutory presumptions did not advise the jury that the presumed fact may, but need not be, inferred from the predicate fact. Rather, the instructions state that the presumed fact is to be "presumed." (See note 4, supra.) However, the appellate court correctly concluded that appellant in the instant case "never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855." (App 2.)

As this Court teaches, the determination whether there has been instructional error "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." (Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, [illegible] Even though the California statutes only created presumptions pertaining to burdens of production of evidence, the jury instructions actually given, by virtue of the unexplained, unqualified use of the term "presumed," could well have induced jurors to have interpreted the presumption in more

stringent, impermissible ways. A reasonable jury could either have interpreted the presumptions as embodied in the instructions as conclusive or mandatory, or as mandatory rebuttable presumptions. (Id., at 516-517.) In either way, the jury would have been erroneously instructed since the prosecution would be therefore relieved of the burden of persuasion on an element of an offense. (Francis v. Franklin, 471 U.S. at 313-314.) 11/ The harmless-beyond-a-reasonable-doubt standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) is applicable to the instructional error committed in the instant case. (Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).) This Court "'plainly [has] the authority' to decide whether, on the facts of a particular case, a constitutional error was harmless under the Chapman standard," albeit this is to be done sparingly. (Id., 478 U.S. at 584.)

It is true that the appellate court has not ex professo applied Chapman to the facts of this case. However, it is evident that it would have concluded that the Chapman test was satisfied, assuming instructional error concerning the statutory presumptions in question. First, the appellate court concluded that "defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855." (App 2.) In determining that there was no error in the trial court failing to give an instruction concerning a good faith belief or mistake of law or fact, the appellate court noted that "defendant offered no evidence to support the giving of such instructions." (Ibid.) That court also determined, contrary to appellant's contention, that "[o]ur review of the record convinces us that substantial evidence supports defendant's conviction." (Ibid.) Indeed, the

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11. We regret conceding error by the appellate court. However, in appellee's brief submitted to that court it was stated: "[T]he trial court erroneously instructed the jury with respect to the presumption because it failed to clearly indicate that the jury might have, but was not required, to infer the intent to commit theft by fraud." It was thereupon urged that instructional error was harmless beyond a reasonable doubt. (Respondent's Brief, 5.)

evidence of guilt is overwhelming, given the fact that appellant presented no evidence which would support a finding of the nonexistence of the presumed facts. The most salient evidentiary points compelling the inference of the requisite intent to steal are:

1. Appellant did not return the car on May 3, 1985, the due date, and it was not recovered by the police until June 27, 1985, following appellant's arrest.

2. There is no evidence that appellant ever contacted the rental agency after he extended the return of the car to May 3, 1985.

3. The rental agency sent registered letters respectively to appellant's business and home addresses listed on the rental agreement. The letter sent to the residence address was returned by the post office with the notation, "Moved with no forwarding address." The letter sent to the business address was not returned by the post office.

4. Numerous efforts by the rental agency owner to contact the appellant, in person or by telephone, were unsuccessful.

5. Appellant did not live at the address he had listed on the rental agreement as his residence, but rather at the place listed as his business. (App 9-11 (pages 5-7 of the Settled Statement on Appeal).)

Clearly, the appellate court's determination that no evidence was presented by appellant to negate the presumed intent indicates its implicit view that, had there been instructional error concerning the statutory presumptions, such error would have been harmless beyond a reasonable doubt.

Other than the instructional error committed with respect to the statutory presumptions, the jury was correctly instructed in every other respect.

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CONCLUSION

For the foregoing reasons, this Court should:

1. Dismiss the appeal with respect to Questions I, II, III, IV, V, and VII on the ground that these do not present substantial federal questions as to the validity of Penal Code section 484, subdivision (b) and Vehicle Code section 10855.

2. Treating the papers whereon the appeal was taken as a petition for writ of certiorari with respect to Questions I, II, III, IV, V and VII insofar as they are deemed to challenge the jury instructions embodying the statutory presumptions in question, certiorari should be denied because any instructional error was harmless beyond a reasonable doubt.

3. Dismiss the appeal with respect to Questions VI, VIII, IX, X, XI, and XII on the ground that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on.

Respectfully submitted,

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FEB 03 1982

FRANK S. ZOLIN, County Clerk

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BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Ct. No.CRA24001 Municipal Court of the Beverly Hills Judicial District No. M83675 MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendant contends that the trial court erred in instructing the jury concerning the presumptions contained in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We do not agree. Both presumptions are presumptions affecting the burden of producing evidence. (See People v. Hemmer (1971) 19 Cal.App.3d 1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the

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presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. (See People v. Hedrick (1980) 105 Cal.App.3d 166, 170.) Here, unlike the defendants in Benner and Hedrick, defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We find no error.

Defendant next contends that the trial court erred by not giving an instruction concerning a good faith belief or mistake of law or fact. However, defendant offered no evidence to support the giving of such instructions. Again, there was no error. (People v. Vineberg (1981) 125 Cal.App.3d 127, 138.)

Next, the court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights.

Defendant contends that the court was required to stay judgment and sentencing pending defendant's appeal. The record, however, shows that the trial court set bail for defendant pending his appeal. Such was all that was required. (Pen. Code, § 1272(2).)

Defendant next claims that the trial court erred by not obtaining a pre-sentencing probation report before sentencing defendant. The trial court had no mandatory duty to do so. (Pen. Code, § 1203(d).)

Our review of the record convinces us that substantial evidence supports defendant's conviction. (People v. Johnson (1980) 26 Cal.3d 557, 562.)

76T576T- PS 12-84

We need not address defendant's remaining contention. (Cal. Rules of Court, rule 105(c); see People v. Merrien (1967) 66 Cal.2d 390, 397.) We observe, however, in our review, no evidence to support appellant's contention.

Presiding Judge

We concur.

Judge

Judge

FILED

FEB 24 1988

FRANK S. ALLEN, County Clerk

Alan Hardey

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Ct. No.CR A24001 Municipal Court of the Beverly Hills Judicial District No. M 83675 ORDER DENYING DEFENDANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER

THE COURT*

The above petition and application having been made, submitted and duly considered,

Said petition and application are denied.

IT IS FURTHER ORDERED that all other demands included in the above petition and application are denied.

Margolis MAR Woods

*Before Margolis, P.J., Roberson, J., and Woods, J.

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FILED
AUG14 1987
S. M. SEIDLER, Clerk Municipal Court
Beverly Hills Judicial District
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FILED
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MUNICIPAL COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BEVERLY HILLS JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

[redacted],

Defendant(s).

NO. MB3675
CAA 24081

PROPOSED SETTLED STATEMENT ON APPEAL; PARTICULARIZED GROUNDS ON APPEAL

Appellant appeals from a misdemeanor conviction of Grand Theft Automobile following a jury trial. Appellant originally filed a proposed settled statement. The People filed a response to the proposed settled statement. In December 1986, on the date of the settling of the statement, Appellant failed to appear.

The Court accepted the People's statement of facts as the settled statement.

Appellant filed an objection to the settled statement. The Appellate Department of the Superior Court remanded the settled statements by the trial court because grounds of appeal were missing and specific portions of record

were not referred to.

Appellant failed to appear on June 12, 1987, the date of the new settling of the statements on appeal. The Court ordered a warrant for appellant's arrest, setting the bail at $10,000.

A new date of August 12, 1987 has been set for a settling of the statement of appeal. Defendant failed to appear.

It should be noted that it is the appellant who is appealing, not the People. Therefore, the grounds of appeal would not be supplied by the People. However, since it is unclear whether Appelant will appear at the hearing on August 12, 1987, the People will include in this proposed statement on appeal, in its entirety the grounds which appellant initially provided. Since these are appellant's grounds of appeal, the People cannot supplement them in any way.

The following is the appellant's grounds on appeal taken from his original proposed statement on appeal.

GROUNDS ON APPEAL

1. Appellant's right to a speedy trial guaranteed by state and federal constitutions was grossly abridged by the Court's denial of Appellant's Motion for Mandatory Dismissal pursuant to Section 1382 of the Penal Code, and said denial constitutes reversible error.

2. The trial court's failure to stand recused and disqualified in accordance with Appellant's Disqualification Petition and its failure to permit Petition to be filed or lodged constitutes reversible error.

3. Trial court's extreme and gross bias and hatred against Appellant and in favor of the People—including threats of oppression, incarceration and punitive fines—deprived Appellant his right to receive a fair trial and other Constitutional rights.

4. Court's refusal to dismiss the Complaint and declare the statutory presumptions contained in Section 10855 of Vehicle Code and 484

of the Penal Code unconstitutional, constitutes an abuse of discretion and reversible error.

5. Trial court's refusal and failure to instruct the jury in accordance with Appellant's Written Jury Instructions and Charges filed by Appellant on March 18, 1986 and its failure to make any sua sponte instructions regarding Appellant's defense that "legal title and permission to the subject vehicle was entrusted to him pursuant to written contract" constitutes infirming reversible error.

6. Trial court's instruction to the jury over Appellant's continuing objection with respect to the presumptions contained in Vehicle Code Section 10855 and Penal Code Section 484, deprived Appellant of his Constitutional rights to a jury trial and fair trial and otherwise constitutes fatal reversible error.

7. Trial court's refusal to admonish and prohibit the prosecution for its misconduct in presenting prejudicial charts and graphs not in evidence to the jury and prosecutor's reference to such documents through the course of the trial and other prosecutorial misconduct constitutes infirming reversible error and denied Appellant's right to a fair trial.

8. Trial court's failure to grant Appellant's Motion to Dismiss on the grounds that the subject criminal proceeding is a prosecution for a "civil debt," for enforcement of a "civil contract," constitutes reversible error.

9. The court's refusal to dismiss the complaint on the grounds that the statutes in question are void for vagueness and ambiguity thereby denying Appellant his due process rights constituting reversible error.

10. Trial court's refusal to grant Appellant's Motion to Dismiss at close of People's case on the basis of insufficient evidence constitutes reversible error.

11. Trial court's refusal to grant Appellant's Motion for Mistrial and for Motion for Judgment Notwithstanding the Verdict constitutes prejudical, reversible error and gross abuse of discretion.

12. Trial court's refusal to strike People's Jury Instructions or to Accord Appellant Hearing on Jury Instructions constituted prejudicial reversible error and abuse of discretion.

13. Trial court's refusal to grant Appellant a Probation Hearing and accord him a Pre-Sentencing Report after it had set the matter for probationary hearing on May 13, 1986 — together with arbitrary and capricious pre-sentencing conditions and revocation of Appellant's own recognizance status and placing him under excessive bail and physical danger constituted a denial of due process of law and is reversible error.

14. Trial court's denial of Appellant's Motion for Judgment in Arrest of Proceedings for Fraud and Trial Irregularities, including jury tampering and constituted reversible error.

15. Court's failure to properly arraign Appellant on the subject charges— together with the failure of the Court to properly discharge its duties to Appellant at arraignment of sentencing and judgment denied Appellant his right to a fair trial.

16. Trial court's refusal to permit inquiry and questioning by Appellant into juror pool and the undue voir dire restriction into bias and conflict of interests of jurors constitutes infirming reversible error.

17. The trial court ex parte, in collusion with The People, conspired to fix the jury pool and jurors assigned to the case, and the jury verdict entered on March 24, 1986 was secured by fraud, trickery, deceit and conspiracy between the trial court and the People and various jurors and alternate jurors.

18. The verdict of the jury entered on March 26, 1986 is

unsupported by any evidence and was the product of a common enterprise to harm Appellant irreparably and his reputation and livelihood and secured by fraud.

19. The trial court's denial of Appellant's Motion For a New Trial constituted infirming reversible error.

20. The trial court's failure to admit Appellant's evidentiary exhibits and/or Take Mandatory Judicial Notice of Legal Proceedings in which Appellant was participating in California and other forums constituted infirming reversible error.

21. Trial court's refusal to to Strike People's Evidentiary Exhibits that were NOT properly authenticated constituted infirming reversible error and should have been suppressed.

22. The trial court's imposition of sentencing Appellant to six (6) months in County Jail with no probation—together with three (3) years of parole—is a cruel, unusual punishment and in excess of the statute and unconstitutional, and must be vacated forthwith, especially in light of the fraud associated with the subject sentencing to prevent Appellant from prosecuting other matters as an attorney and/or plaintiff.

23. For such further grounds as appear from the transcript of evidence and/or proposed statement filed herein, including but not limited to, the fact that the subject arrest and consequent proceedings were a fraud, nullity and carried out in total absence of any probably cause and trial court's refusal to dismiss proceedings were in concert with third parties to harm and falsely imprison Appellant.

The following is the People's proposed statement on appeal which has been certified by the court as the settled statement on appeal:

On March 25, 1985, EUGENE JOHN CARELLA rented a car from MRG Car

Rental, located in Beverly Hills, from Jessica Patricio. The rental agreement was for 30 days. The agreement signed by Appellant included in it the legal obligation to return the automobile on the agreed date. The next day on March 26, 1985, Appellant exchanged the car for another and signed an agreement to return the car on April 26, 1985.

Appellant extended by telephone the rental agreement until May 3, 1985. Appellant did not return the car on May 3, 1985. The owner of MEG, Galil Yaacov, telephoned Appellant numerous times. He even went to the location listed as Appellant's business but was never able to contact Appellant. It was discovered that Appellant did not live at the address he listed on the rental agreement as his residence. Appellant actually resided at the address which he listed on the rental agreement as his business.

Appellant never returned any of the phone messages left by MEG or Yaacov. Mr. Yaacov sent registered letters to both addresses listed by Appellant on the rental agreement. The letter addressed to the location listed as his residence on the rental agreement was returned by the post office as stating on the letter, "Moved with no forwarding address." The demand letter sent to the address left by Appellant as his business address on the rental agreement was not returned by the post office.

Mr. Yaacov continued to telephone Appellant at the number left as his business but later found to be a hotel. His calls were not returned. Mr. Yaacov asked the person taking the messages, the hotel clerk, if Appellant was receiving the messages that he was sending. The clerk stated that Appellant was receiving the messages. The registered letter dated May 16, 1985, demanded the immediate return of the car or the matter would be turned over to the police.

On June 3, 1985, Mr. Yaacov reported the theft of the car to the

Beverly Hills Police Department. Beverly Hills Detective Schwab left messages to Appellant but they were not returned. An arrest warrant was obtained and on June 27, 1985, Appellant was arrested and the car was recovered in the adjoining parking lot of the address which Appellant listed as his business address.

The car had an excessive amount of mileage on it from the date rented. The brakes were worn down so low that they needed replacement. The car also had minor dents around the body. At no time did Appellant ever contact the MPG rental office after he extended the return of the car rented car to May 3, 1985. Appellant never paid for the use of the car other than the initial $400 deposit.

Two witnesses testified for the defense. The first was Appellant's fiancee. She testified that at the time of the [illegible] with Appellant at the address he listed on the rental application as the business address. She testified that she didn't remember receiving any messages to return the rented car, although she normally left the "message gathering" duties to Appellant.

She testified that on a Saturday, May 11, 1985, she remembers going to a gas station to fill up the rented car with gas, accompanied by Appellant. It was in the evening hours and close to the MPG rental office.

She knew that Appellant has a large amount of cash on him at the time. She did not know what he was going to do with the money. She stated that she normally rode the bus and not in Appellant's rented car. She knew nothing of the rental agreement. She believed there was a conspiracy against Appellant and herself which involved the Central Intelligence Agency and the Beverly Hills Police Department.

The second witness to testify for the defense was Jennifer Ayres who was employed as a cadet at the Beverly Hills Police Department. She stated

that as a part of her duties, she would occasionally answer the telephone. She said that she did work on June 3, 1985 and that she had no memory of whether Appellant telephoned Detective Schwab.

After a jury trial, Appellant was convicted of Grand Theft Auto as a misdemeanor, Penal Code Section 487(2) and acquitted of Unlawful Taking of a Vehicle, Vehicle Code Section 10851. Appellant was sentenced to six months of county jail and three years formal probation.

Respectfully submitted
IRA REINER
District Attorney of
Los Angeles County

By

Helen Wojnak for

Deputy District Attorney

Attorney(s) for

JUDGE'S CERTIFICATION

IN THE MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA
9355 Burton Way, Beverly Hills, Calif. 90210

Case Number M83675

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff(s) vs. EUGENE CARELLA, Defendant(s)

The Court does now settle and allow the [illegible] Statement on Appeal and certifies that the same are true and correct statements of the proceedings had in the above entitled action.

Dated: AUG 17 1967

Judge of the Municipal Court of Beverly Hills Judicial District

MISCELLANEOUS PURPOSE FORM

FILED

OCT 27 1987

FRANK S. ZOLIN, County Clerk

Alan Hardey

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA,	Superior Ct. No.CR A24001 Municipal Court of the Beverly Hills Judicial Dist. No. M 83675 ORDER DENYING APPLICATION FOR ORDER VACATING BRIEFING SCHEDULE, MOTION TO STRIKE SETTLED STATEMENT AND APPLICATION FOR WRIT

THE COURT*

Defendant's application for order vacating this court's briefing schedule, motion to strike the settled statement and application for writ having been filed and having been duly considered,

Said applications and motion are hereby denied.

The time for filing briefs is reset as follows:

*Before Cooperman, P.J., Soven, J., and Newman, J.

vm8

Appellant's Opening Brief - November 16, 1987

Respondent's Brief - December 7, 1987

Appellant's Reply Brief - December 17, 1987

APPELLANT WILL BE GRANTED NO FURTHER EXTENSIONS WITHIN TO FILE HIS BRIEF. IF SAID BRIEF IS NOT FILED BY 3:00 P.M. ON THE AFORESAID DATE, THE APPEAL WILL BE DISMISSED FORTHWITE.

76T576T- PS 3-83

STATE OF CALIFORNIA

MARGOLIS, Presiding Judge
NEWMAN, Acting Presiding Judge
ROBERTSON, Judge
WOODS, Judge

Date THURSDAY, JANUARY 28,1988
B.J. SCHNEIDER, Deputy Clerk
ALFORD Deputy Sheriff
9:00 a.m.
Page 1

CR A 24001 Mun. Ct. Beverly Hills (MRW) — 1

PEOPLE, etc., - A.T. Guminski,D.D.A., Plff. & Resp.,
vs
EUGENE JOHN CARELLA, - Pro Per, Defc. & Applt. — 0

Merits (STEIN - J)

Orally argued ( ) Submitted ⋈ On Briefs ⋈ Oral argument waived by Appellant in open court ( ) by phone ( ); Respondent in open court ⋈ by phone ( )

OTHER:

Post Hearing Notes

CR A 24408 Mun. Ct. Inglewood (NMW) — 2

PEOPLE, etc., - A.M. Burger, Sr.D.C.A., — 0
Plff. & Resp.,
vs
LALU MAHESH PRASAD, - M.H. Ehrlich, Deft. & Applt.

Merits (ROBINSON,JR., - J)

Orally argued ⋈ Submitted ⋈ On Briefs ( ) Oral argument waived by Appellant in open court ( ) by phone ( ); Respondent in open court ( ) by phone ⋈

OTHER:

Post Hearing Notes

CR A 24515 Mun. Ct. Los Angeles (WNR) — 3

PEOPLE, etc.,- J.G. Bogigian,D.C.A., Plff. & Resp.
vs
NORMAN GORDON PAGE, - A. VonSonn, Deft. & Applt. — 0

Merits (DUNN - J)

Orally argued ( ) Submitted ⋈ On Briefs ⋈ Oral argument waived by Appellant in open court ( ) by phone ( ); Respondent in open court ⋈ by phone ( )

OTHER:

Post Hearing Notes

THE ... OF ... AT ... SEP 20 1988
FR ...
BY M. P. Kimbrough

NOV 17 1987

11/18/87

IN THE APPELLATE DEPARTMENT

OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant vs. PEOPLE OF STATE OF CALIFORNIA, Appellee	APPEAL NO. CRA 24001

FILED

NOV 18 1987

ON APPEAL FROM LOS ANGELES MUNICIPAL COURT

BEVERLY HILLS JUDICIAL DISTRICT

APPELLANT BRIEF

EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

I.

STATEMENT OF CASE

A. Pre-Trial Proceedings.

In the early morning of June 27, 1985, Appellant, Eugene John Carella, a nationally-recognized attorney specializing in federal litigations and appellate work, and, in particular ERISA litigation, residing in Los Angeles, California, was falsely arrested at his residence in Westwood, California, by Beverly Hills detectives Schwab (a former rental agency car owner) and a Doe detective. At the time of the subject false arrest while appellant was asleep in his apartment, said detectives threatned appellant and [illegible] with an automatic weapon which said detectives later placed at appellant's head stating "they would blow appellant's brains out if he spoke."

Appellant was falsely arrested for alleged violations of § 10851 of the Vehicle Code and § 484 of the Penal Code with respect to the subject rental vehicle furnished to him pursuant to a written contract. A two-count misdemeanor complaint was filed by the District Attorney for the County of Los Angeles and the proceedings denominated as Los Angeles Municipal Court No. M 83675 were commenced on June 27, 1985 against appellant.

Appellant was brought before John Murphy who unbenounced to appellant, was a commissioner of said court, and not a

judge. At no point in time from June 27, 1985 up and to the time that appellant learned of the status of said John Murphy as a commissioner and moved for his recusal was appellant ever apprised by the court of his status, nor did appellant ever consent to said commissioner, nor did he ever make an intelligent waiver of his right to be arraigned or otherwise have his trial presided over by a judge of the municipal court.

The false criminal charges instigated against appellant emanated from a written rental automobile contract furnished to appellant which defined and controlled the relationship of the parties, including the rental car company, which, in fact, was MPG Car Rental (not the legal owner or registered owner). The charging allegations recited the legal owner of the vehicle to be Ciero and Ciera Car Rental (Sierra). Appellant was not furnished with a written copy of the subject complaint despite a specific demand by him until on or about December 2, 1985.

On June 27, 1985, appellant refused to waive his right to a speedy trial and the matter was continued to July 1, 1985 by the then acting commissioner and continued again to August 9, 1985, and again to October 20, 1985. At no point in time did the commissioner or the district attorney or any other judicial person ever advise appellant of his specific

constitutional rights with respect to a speedy arraignment or speedy trial, nor did they ever advise appellant of the specific consequences of making any waiver of his rights to a speedy trial or otherwise secure the statutory consent of appellant to waive said rights. At no point in time did appellant waive his right to a speedy trial.

On October 20, 1985, appellant moved to dismiss the subject false charges relating to the interpretation of a "civil rental contract" on the grounds that he had not been brought to trial timely, had not been accorded a probable cause hearing though in custody at the time of his "arraignment" and that the provisions of § 1382 of the Penal Code were mandatory, [illegible] and that the commissioner was compulsed to dismiss the false charges at once and to cease and desist in further conduct of the litigation. Appellant further advised the trial court that the proceedings were in total want of probable cause, malicious and vexatious in nature, and carried out for purposes of harming appellant in his person, property and livelihood.

Appellant renewed his motion again on December 2, 1985 for a mandatory dismissal and also specifically inquired as to whether John Murphy was a judge as indicated on the daily trial calendar posted on his courtroom door, inasmuch as appellant never consented to the jurisdiction of a commissioner. It

was at this point in time that John Murphy first made a disclosure that he was a commissioner (after he had denied appellant's § 1382 motion to dismiss). Appellant forthwith moved for recusal and the cause was then reassigned by said commissioner to visiting judge R. Reynolds, sitting in Division 5. Upon learning from appellant that he had not received a written copy of the complaint filed against him, said Judge Reynolds furnished appellant with a copy of the complaint and further advised him in open court that Ciero Rental Car was listed as the legal owner of the subject rental vehicle as recited in the complaint, notwithstanding that appellant had rented the subject vehicle from MPG Car Rental, and this disclosure by the court totally surprised and astounded appellant.

On December 16, 1985, the matter came on in Division 5 again at which time appellant renewed his motion to dismiss the subject proceedings for failure to accord him a speedy trial and because of the bogus chargaes and that there was no probable cause or probable cause hearing extended to appellant despite his demand for same while in custody at the time of his "arraignment." Appellant's motions were denied.

On January 13, 1986, a subsequent visiting judge from Northern California, identified as Judge Morse, presiding over the cause in Division 5 without prior notice to appellant, threatened, intimidated and sought to silence appellant in

his attempts to have the subject charges dismissed against him pursuant to § 1382 of the Penal Code and to declare a mistrial, inasmuch as no court despite their constitutional requirement to do so, had specifically made a detailed reading of the charges brought against appellant, or the consequences that would attach in the event that appellant were to waive any of the constitutional rights afford him under the state and federal constitution. Appellant's motion was denied and his request for continuance to seek a writ with the Appellate Department of the Superior Court was also denied. This notwithstanding tne absence of any evidence whatsoever that the court had made the proper instructions to appellant regarding his constitutional rights or the effect of waiving same.

On March 7, 1986, pursuant to written motion set for hearing on that day in Division 2 of the Municipal Court, appellant moved to dismiss the subject complaint on the grounds that the statutory presumptions contained in Vehicle Code § 10855 and Penal Code Section 484, et seq., were unconstitutional, that the subject statutes were void for vagueness and ambiguity, that the subject criminal prosecution was a prosecution for a "civil debt" involving substantial questions of contractual interpretation properly the subject of civil dispute and contract grievance resolution procedures and that the presumptions improperly and unconstitutionally deprived appellant of having each and every element of the case heard before the jury and

intruded upon the jury function, and were arbitrary and caprcious. Said motion was denied without prejudice to it being renewed subsequently.

B. Trial Proceedings.

On March 17, 1986, the matter came on for jury trial and jury selection. During voir dire appellant vigorously sought to challenge the juror list and juror pool from whence the jurors were selected. The trial court sitting as Judith O. Stein, who was assigned to the proceedings without prior notice to appellant, adamantly abridged and obstructed appellant's efforts. Appellant's right to ask prospective jurors questions pertinent to the proper and fair discharge of their functions as jurors, including conflicts of interest questions, associations, prior awareness or knowledge by them of appellant or the subject cause was strenuously foreclosed by the trial court and deprived appellant of his right to select jurors who would accord him a fair and impartial trial. During the voir dire process on March 17, said Judith O. Stein exhibited gross and extreme bias and hostility and ill will toward appellant of such a magnitude and proportion as to lead a reasonable disinterested third person to conclude that she could not accord appellant a fair trial and that her actions toward appellant in view of the jurors had unduly prejudiced and would continue to prejudice appellant and deprive him of his right to receive

a fair and impartial trial by jury.

On March 18, 1986, appellant forthwith moved for the "immediate disqualification" for cause in writing of said Judith O. Stein on several grounds -- and, in particular, that she had ex parte communications with the District Attorney and other third persons gained outside of the courtroom and had acted in concert with said third parties to grossly harm appellant and his right to have a fair and impartial trial. The trial judge prevented appellant from filing the subject disqualification petition and/or lodging said document with the Clerk of the court and appellant specifically designates said Motion for Disqualification sought to be filed and/or lodged by him. The Disqualification Petition sought to have Judge Stein cease and desist from all further conduct in the trial proceedings and to have the disqualification motion heard and adjudicated in accordance with the proper legal procedures for same. In short, he trial court not only prevented appellant from his timely and efficacious challenge to her and his right to receive a fair trial, but she retaliated by maliciously and malevolently preventing appellant from speaking or otherwise carrying forward with his defense by placing him into contempt, removing him from the courtroom and incarcerating him and imposirg monetary fines and penalties without cause and to impede the presentation of his defense. The bias and disparagement by the trial court was done in

the presence of the jurors and done to irreparably taint appellant and otherwise prejudiced him in the eyes of the jurors.

On March 18, 1986, appellant filed his request to charge the jury (jury instructions) and made specific requests upon the trial court to refrain from giving any instructions as to the presumptions contained in § 10855 of the Vehicle Code or § 484 of the Vehicle Code as the instruction by her on these presumptions constituted infirming reversible error, deprived appellant of his right to have the jury decide all elements of the alleged offenses, and otherwise prevented him a fair trial. Appellant also specifically requested an oral hearing on the jury instructions to ensure that the court [illegible] as to the presumptions, as to do so would be per se error, and to otherwise ensure that the court would instruct specifically and affirmatively the jury as to the requested defenses of appellant concerning the good faith mistake of fact and good faith belief and appellant's legal right and title to the subject vehicle conferred pursuant to the terms and provisions of the automobile rental contract and agreement by which the vehicle was furnished to appellant and other specific intent instructions.

That the trial court specifically refused to grant appellant any hearing, and otherwise refused to give the affirmative instructions referenced above despite her absolute requirement

to do so existing in all prosecutions of this type and further compounded the harm by then instructing the jurors as to the statutory presumptions contained in the aforereferenced sections over the objection of appellant.

The People's evidence consisted of three witnesses--two employees of MPG Car Rental who furnished the jury with conflicting, perjured statements concerning the facts and events relating to the subject transactions and a Detective Schwab of the Beverly Hills Police Department, a former Budget Rental Car franchise owner/agent, who sought to use the police powers to enforce a civil contract.

The testimony of the People's witnesses, together with their documentary evidence, showed that they had sent a certified letter to appellant which was not received by him, and they did not produce any evidence that appellant had received any written communication or other communication whatsoever concerning the subject vehicle. Further, all of the People's witnesses testified that despite the fact that they knew appellant lived a little more than one mile from the rental office where the vehicle was rented in Beverly Hills that not one of them came by to his apartment and left a note at his door, or otherwise seek to personally visit with him or to check on the subject vehicle which was parked in appellant's garage every night.

The People's evidence was also deficient in that there were discrepancies in the lack of authentication as to which rental vehicle contract was in effect and otherwise controlled the contractual relationships of the parties and the knowledge of the respective MPG Car Rental people as to the specific amounts of monies that appellant furnished to the rental car company when he was furnished the subject vehicle. The People's evidence was also conflicting and equivocal as to who was the legal owner of the subject rental vehicle.

Further, all of the People's witnesses testified that none of them ever made a written demand for additional monies owned purportedly pursuant to the contract on appellant. Further, [illegible] the subject rental vehicle to appellant with their permission and consent and that at no point in time was that permission and consent revoked with the knowledge of appellant.

The prosecution represented by Deputy District Attorney Alarcon committed gross and prejudicial prosecutorial misconduct throughout the entire trial proceedings. In addition to derogatory and personal disparagement of appellant, said district attorney conducted numerous ex parte communications with the trial court in an attempt to fix the juror pool and to prejudice the appellant in light of the jury's eyes. Additionally, the prosecution commencing with his opening statement put

before the jurors written documents, charts and graphs without any evidentiary support, foundation, and without otherwise being corroborated which grossly misrepresented the factual circumstances concerning the transactions -- all to the prejudice and detriment of appellant and over his continuing objections to strike said documents from being shown to the jurors or permitting the prosecution to refer to said documents as though they were evidence. All of the motions made by appellant to strike and the concommitant motion for a mistrial for prosecutorial misconduct were also denied by the trial court.

Appellant's motion to dismiss the proceedings at the close of the People's case on the basis of insufficient evidence [illegible] malicious prosecution, and on the basis that the statute sued upon by the People were constitutionally defective and void for vagueness were all denied by the trial court on or about March 19, 1986.

Appellant's defense was grossly stunted and irreparably prejudiced by the disparaging and prejudicial remarks made by the trial court in front of the jury and the continuing use of threats of contempt, fines and incarceration by the trial court with the express purpose of interfering with appellant's defense. Appellant produced evidence at the time of trial by direct testimony that he had been physically in Westwood in the Los Angeles area each and every day and night during

the subject period in question and had been actively involved as an attorney and/or litigant in numerous legal proceedings located in the Superior Court for the County of Los Angeles, Central District, and U. S. District Court for the Central District of California during the periods in time in question, and material to the defense that appellant had absolutely no intent to "embezzle or unlawfully take a rental vehicle" which he had received "pursuant to a written contract, vesting permission and authorization in him." In particular, appellant respectfully demanded that the trial court take judicial notice mandatory pursuant to the Evidence Code of appellant's attendance on June 17, 1985 at the U. S. District Court located at 312 No. Spring Street, where he was seeking attorneys fees owned [illegible] in the amount of $140,000+; a proceeding where appellant attended before a retired judge acting as a referee in a Superior Court litigation on June 20, 1985 at 3255 Wilshire Boulevard in Los Angeles; judicial notice of an EEOC complaint filed at the federal office on or about June 21, 1985 wherein appellant had brought a discrimination claim where his employer had unjustificably terminated his contract valued at $100,000+ without cause and in bad faith; an appearance at Santa Monica Municipal Court on June 21, 1985 to satisfy a traffic citation issued on June 6, 1985 -- as well as other proceedings within two (2) weeks of the subject false arrest of appellant on June 27, 1985. The trial

court denied all of the demands of appellant to take judicial notice or to enable appellant to file documents of these proceedings, severely injuring and prejudicing his defense and his motion for a new trial.

Appellant also produced evidence by his fiancee that she had accompanied him on May 11, 1985 to the offices of MPG Car Rental located approximately one mile from appellant's residence in Beverly Hills and that she was aware that appellant had cash monies on him and had actually gone to the offices of MPG Car Rental but said office was closed, or there was no agent on duty, whereupon appellant secured gas at the Union Station contiguous with the MPG Car Rental located at Doheny [illegible] and dated May 11, 1985 which appellant sought to move into evidence after it was corroborated by his witness as being a true and correct receipt. The trial court suppressed the document from evidence which appellant specifically incorporates into this statement and otherwise prevented the witness from testifying as to her knowledge as to the events in question on May 11, 1985 when appellant was physically at the rental offices of MPG Car Rental in Beverly Hills.

Appellant also produced evidence from a Jennifer Ayers of the Beverly Hills Police Department that she was, in fact, on duty on or about June 5, 1985 when appellant called, returning Detective Schwab's call on June 3, 1985, and when she advised

PUBLISHER'S NOTE

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FOR FILMING
App 31

and his cause in their eyes, and because there is a total failure of evidence to support the verdict. Additionally, the verdict was obtained in violation of appellant's constitutional rights by the trial court refusing to recuse herself by her refusal to make the instructions requested by appellant in the Jury Instructions filed by him on March 18, 1986, and because she consciously instructed the jury on the presumptions contained in the Vehicle Code and Penal Code when she was constrained as a matter of law not to do so.

C. Post Trial Proceedings.

Appellant moved subsequent to the verdict of the jury in arrest of proceedings for fraud and trial irregularities immediately upon the jury verdict being rendered on Monday, March 24, 1986. The trial court summarily refused appellant's motion without even considering the record as a whole. Similarly, appellant's motion for a mistrial which was in the form of a written document which appellant specifically incorporates into his proposed statement identified numerous infirming errors of law requiring that the verdict of the jury be set aside. The trial court refused appellant the right to file or lodge the subject motion for mistrial and otherwise acted in a concerted way to deny appellant his right to access to

the legal system and to be heard in a manner consistent with his right to have a fair trial and his right of due process of law. The trial court's prejudice against appellant was further compounded after appellant had made a written demand for a probation hearing and pre-sentencing report demonstrating his outstanding background and which entitled him to his own recognizance release pending an adjudication of the instant appeal.

On March 28, 1986, the matter having been continued on the court's motion to that date, appellant advised the court of his outstanding background, the gross abuse of process being carried out and the fraud associated therewith and his [illegible] trial court and further directed the court's attention to his written demand for a probation hearing and pre-sentencing report filed with the clerk earlier in the week. At that time the court, without jurisdiction, advised appellant that notwithstanding the lack of any diminished capacity defenses, she was ordering appellant to contact a Dr. J. Davidson on or before April 1, 1986, a physician and psychiatrist and furnish appellant with his address and telephone number and also ordered appellant to contact the probation department located in Santa Monica. That the hearing on March 28, 1986 which was a Good Friday, appellant's religious holiday, occurred two days prior to Easter Sunday. On Monday, March

31, 1986, appellant physically went to the offices of Dr. Davidson in Beverly Hills about 2:30 P.M. and physically met and visited with the doctor pursuant to the court order. At that time, Dr. Davidson advised appellant he was with a patient and asked appellant for his address which was furnished to the doctor and appellant further indicated that he wished to shcedule a visit and appointment with him within the next week to ten days and was ordered to do so by the court over his objection. Appellant also contacted the telephone number for the probation department furnished to him by the Clerk of the court on March 28, 1986. On thursday, April 3, 1986 Appellant spent his entire day taking depositions in an action he had been commencing for malicious prosecution and other

[illegible] office located at 3255 Wilshire

Boulevard at which the City Attorney for the City of Los Angeles was in attendance. That on April 4, approximately 6:30 A.M. while in the bathroom in his Westwood apartment, Beverly Hills police and Detective Schwab again gained entry into appellant's apartment, having keys to said apartment, without permission, consent, authorization of appellant, and threatened and handcuffed appellant and intimidated appellant's fiancee. No warrant was shown or produced by said detectives and appellant was advised that Judith Stein ordered that appellant be arrested for having "failed to visit with Dr. J. Davidson," even though he had actually physically visted with him March 31, 1986 -- three days prior to the false arrest by Judith Stein.

Appellant was brought before the court at 5:00 P.M. on April 4, 1986, sitting as Judith Stein, and demanded to know the basis for his arrest, at which time she advised appellant he had not visited with Dr. Davidson, whereupon the trial court refused appellant the right to speak or the right to a hearing and directed that he be incarcerated at the County Jail in Los Angeles. Appellant was body-chained and again transported and incarcerated at Los Angeles County Jail against his will. On Monday, April 7, 1986, appellant was brought before the trial court and again moved for her recusal and demanded that he be entitled to a probation report and hearing and pre-sentencing report. The court would not allow him to speak and proceeded to sentence appellant right then and [illegible] on April, 1986 to six (6) months in the County Jail, no County probation, three (3) years of parole and monetary restitution in an amount to be affixed by the probation department. There was no arraignment on judgment or sentencing by the trial court on April 7, 1986, and no opportunity for appellant to be heard whatsoever.

On April 8, 1987, while appellant was still incarcerated at Los Angeles County Jail, he was once again brought before the trial court whom he recused and he advised the trial court that he was being held as a "political prisoner" and demanded his immediate release from custody. The trial court again prevented appellant from speaking and reiterated his sentence

and again failed to accord appellant his probation hearing, probation report, or to be released on his own recognizance. The trial court also willfully refused appellant's motion to stay the judgment and sentencing pending an appeal to the Appellate Department and a demand that he be released because of his background and commitments in the Los Angeles area on his own recognizance and also denied appellant reasonable bail and ordered him confined on a "misdemeanor charge", first purported offense, fraudulent in nature, with $25,000 bail. Appellant was chained and incarcerated to the Los Angeles County Jail until on or about May 13, 1986 when bail was placed after the amount was reduced by the Appellate Department.

SUMMARY OF MATERIAL FACTS

1. Appellant was furnished subject rental vehicle with written permission and consent of owner pursuant to a written rental contract.

2. Appellant never received demand letter to return vehicle to MPG Car Rental company as letter was returned to sender (MPG) and no other evidence was introduced showing receipt of demand letter.

3. Trial court instructed jury on presumptions contained in § 484 of the Penal Code and § 10855 of the Vehicle Code despite recurring objection to said instructions by appellant.

4. Trial court refused to instruct jury on specific intent, mistake of fact, or mistake of law, or good faith belief in right or claim to vehicle despite written request which was filed on March 18, 1986 by appellant requesting said instructions.

5. MPG is not the legal owner of the rental vehicle.

6. Applicant never waived his right to a speedy trial at any time and no consent express or implied as defined in Penal Code § 1382 exists in the record.

7. That appellant was physically in Westwood at his Wilshire Boulevard address in Los Angeles, California at all material times during the rental period in question.

8. That Appellant was discharging his duties at all material times in Los Angeles as an attorney and made numerous court appearances in State and federal proceedings in Los Angeles right up to his false arrest on June 27, 1985.

9. That appellant specifically moved for written disqualificatio of trial Judge Judith Stein on March 18, 1986 by written affidavit.

10. That appellant filed and made writt[illegible] application

for probation and probation hearing prior to entry of sentencing and judgment on March 28, 1986.

11. That appellant physically visited and met Dr. Davidson at his office in Beverly Hills, on March 31, 1986.

12. That appellant's written motion for mistrial and his motion to have verdict set aside and for new trial were denied by trial court.

13. That appellant's motion to challenge jurors on March 18, 1986 was denied.

14. That apellant moved to dismiss for insufficient evidence was denied at close of People's case.

15. That appellant objected to all exhibits offered in evidence by the People.

16. That appellant objected to all jury instructions made by trial court and specifically demanded a hearing on jury instructions which was required by trial court.

17. That appellant filed a notice of appeal from the April 7, 1986 judgment and sentencing on April 8, 1986.

18. That the trial judge refused to grant appellant

a pre-sentencing probation report, a pre-sentencing probation hearing, despite his timely demand for same.

19. that the trial judge refused to stay the judgment and sentencing pending appellant's appeal to the Appellate Department and compelled Appellant to serve jail time notwithstanding his timely appeal at Los Angeles County Jail.

20. That appellant served more than 50 days in the Los Angeles Central Jail as the result of the false arrest and false conviction and false judgment, the subject of this appeal.

21. That no arraignment on sentencing was afforded appellant when sentenced on April 7, 1986.

22. That evidence exist the subject rental vehicle was not in good working order when taken from appellant's apartment parking facility, it having faulty brakes.

23. that at all material times Detective Schwaub and MPG and Yahil Galil knew of the whereabouts of the subject rental vehicle where it was parked each and every night and where appellant lived.

24. That the distance between appellant's residence and MPG Car Rental office was approximately 2 miles.

25. That appellant traveled to MPG Car rental facility on May 11, 1985, but the offices were closed and appellant inquired about said rental offices at the Union 76 Gas Station physically contiguous to said MPG Car Rental and purchased gas that date and offered the May 11, 1986 areceipt in evidence.

26. That appellant had never been convicted of any crime (misdemeanor or felony) other than the subject false arrest and false conviction and is an attorney duly licnsed to practice law in state and federal forums throughout the United States and listed in Who's Who in American Law.

27. That Jennifer Ayres did work for Detective Schwaub in the Beverly Hills Police Department and did take his message on June 5, 1985 when appellant had called the station.

28. That only appellant could legally receive mail sent to him as registered mail.

III.

ARGUMENT

TRIAL COURT'S INSTRUCTIONS TO THE JURY ON CONCLUSIVE PRESUMPTIONS CONTAINED IN PENAL CODE § 404 AND 10855 OF VEHICLE CODE OVER APELLAN T'S OBJECTION CONSTITUTE FLAGRANT CONSTITUTIONAL INJURY AND IS PER SE REVERSIBLE ERROR.

The record is clear that in the instant appeal that appellant was furnished the subject rental vehicle with the permission and consent of the owner and that the demand letter allegedly sent to appellant was marked "returned to sender" and that no evidence was ever introduced that appellant ever received any other demand letter for the MPG car rental or had knowledge of demand for return of the vehicle.

Accordingly, the instant appeal comes clearly within the ambit of People v. Hemmer, 19 C.A. 3d 1052, 92 Cal. Rptr. 516 (1971) wherein the Fourth District Court of Appeal held the presumptions found in § 484 of the Penal Coee and 10855 of the Vehicle Code to be unconstitutional on their face because they violate [illegible] Fourteenth Amendment due process to have a jury deliberate and decide all elements of the case, and baecause the presumptions are irrational and arbitrary.

The facts of the instant case fortify the holding. As the court noted the presence of intent to commit theft has to exist and where a demand letter is presumably sent but not actually received by the defendant is arbitrary and unconstitutional and any instructions on its effect violates defendant's rights of due process guaranteed by the Fourteenth Amendment.

The Third Circuit in People v. Hedrich, 105 Cal. App. 3d 166, 164 Cal. Rptr. 169 (1980) expounded upon the Henner mandate by holding a trial court instruction on the presumptions

contained in § 484 of the Penal Code and 10855 of the Vehicle Code which directed the jury to conclusively presume defendant's intent to commit theft constituted per se reversible error because it removed an element of the crime from consideration and determination by the jury in violation of appellant's right to a jury trial guaranteed by the 6th and 14th Amendments.

Both Hedrich and Hemmer are of irresistible force commanding this Court to vacate the judgment and sentencing of the trial court herein because their application requires per se reversal.

IV.

TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS RELATIVE TO MISTAKE OF LAW, MISTAKE OF FACT, GOOD FAITH BELIEF IN RIGHT OR CLAIM TO PROPERTY OR SPECIFIC INTENT OR TO MAKE SUA SPONTE INSTRUCTION PERTAINING TO SAME CONSTITUTES PER SE REVERSIBLE ERROR.

The actions of the trial court to refuse to instruct the jury as requested or to make a sua sponte charge to the jury pertaining to appellant's good faith claim of right and consent to the subject rental vehicle constitutes infirming reversible error.

In cases involving grand theft charges, the Second Appellate Department, the Court of Appeal held that in prosecution for grand theft, trial court's failure to make a proper instruction requested as to the defense that the property was taken by

appellant with good faith claim of title and right to the subject property was prejudicial error (pursuant to a rental contract). People v. Threestar, 213 Cal. Rptr. 510, 167 C.A. 3d 147 (1983).

In People v. Ramirez, 107 Cal. Rptr. 174 (1980), the court stated that an act or omission made under ignorance of fact which disprove any actual intent was a valid defense to the crime of grand theft and court committed reversible error by not so instructing the jury.

Moreover, the trial court's refusal to make sua sponte any instruction that the appellant had acquired the property legally with the owner's consent as in the instant case.

It was held in People v. Navarro, 160 Cal. Rptr. 692 99 C.A. 3d Supp. 1 (1979) that trial court had a sua sponte responsibility1 to instruct the jury that appellant had in fact believed he had a right to the property in question, even though such belief was unreasonable as measured by objective standards. (See also People v. Phelps, 45 Cal. App. 2d 345, 114 P. 2d 71 (1941).

The failure of the trial court to make any instruction whatsoever in the instand case either sua sponte or pursuant to appellant's request constitutes infirming reversible error.

V.

FAILURE TO BRING APPELLANT TO TRIAL WITHIN 45 DAYS FROM THE DAY HE WAS ARRAIGNED CONSTITUTES A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL GUARANTEED BY THE UNITED STATES CONSTITUTION.

Penal Code § 1382 specifically sets forth the requirement for commencing trial in a misdemeanor prosecution. The language of § 1382 is mandatory. Appellant's refusal to waive his right to a speedy trial as evidenced in the transcript of July 1, 1985, specifically refused to consent to a waiver of his rights.

Under these facts, the trial court was compelled to dismiss the proceedings at that point upon demand. The trial court's refusal to do so constitutes reversible error.

VI.

THE TRIAL COURT'S REFUSAL TO STAY JUDGMENT AND SENTENCING AND REMANDING APPELLANT FOR IMMEDIATE INCARCERATION, DESPITE DEMAND THAT JUDGMENT AND SENTENCING BE STAYED PENDING APPEAL VIOLATES THE SUPREME COURT MANDATE ANNOUNCED IN RE BAKKE,

42 Cal. 3d 84, and

Appellant's Due Process Constitutional Guarantees

VII.

THE TRIAL COURT'S REFUSAL TO ACT UPON APPELLANT'S DISQUALIFICATION CONSISTENT WITH LAW CONJOINED WITH PREJUDICE AND ANIMOSITY DIRECTED AT APPELLANT DENIED APPELLANT FAIR

TRIAL GUARANTEED BY THE 14TH AMENDMENT.

VIII.

THE TRIAL COURT'S REFUSAL TO AFFORD APPELLANT A PRE-SENTENCING PROBATION REPORT, OR PROBATION HEARING, DESPITE DEMAND FOR SAME, DENIED APPELLANT EQUAL PROTECTION AND DUE PROCESS OF LAW.

IX.

THE RECORD IS BEREFT OF ANY EVIDENCE WHATSOEVER TO SUPPORT THE JURY FINDINGS OF GUILT AND THE EVIDENCE IS THEREFORE GROSSLY INSUFFICIENT AS A MATTER OF LAW REQUIRING THE JUDGMENT AND CONVICTION BE VACATED.

CONCLUSION

For all the foregoing reasons, together with those advanced at the time of hearing and as more fully appear in the record, Appellant respectfully prays the judgment and sentencing of the trial court be forthwith vacated and the judgment reversed with prejudice.

Dated: November 16, 1987

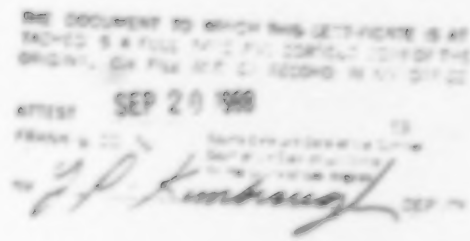
BY: _____
EUGENE JOHN CARELLA, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I served a true copy of the foregoing Appellant Brief on all parties 8/14/87 of record by first class mail, postage prepaid, in Los Angeles, California, on the following:

District Attorney
849 S. Broadway
11th Floor
Los Angeles, California 90012

Judith Stein
Beverly Hills Municipal Court
9355 Burton Way
Beverly Hills, CA 90210



EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

FEB 18 1982

FILED

FEB 18 1982

FRANK S. ZOLIN, County Clerk

By L. A. Kimbrough

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Appeal No. CRA 24001

LAMC M 83675

APPELLANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER; DECLARATION OF EUGENE JOHN CARELLA; DECLARATION OF PAUL PFISTER; MEMORANDUM OF POINTS AND AUTHORITIES.

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT [WITHOUT WAIVER OF DISQUALIFICATION TO JUDGES NEWMAN, MARGOLIS, WOODS, ROBERTSON]

COMES NOW EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to Judges of Appellate Department of Superior Court of California, County of Los Angeles, Central District, as constituted, pursuant to the Rules of Court and the Supreme Court mandate in In Re Armstrong, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order of Rehearing and Reconsideration of the Memorandum Judgment of

February 3, 1988 and further order that a complete Transcript of Proceedings in the void and criminally-inspired and orchest trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject petition of rehearing and reconsideration, Appellant shows this Court the Declaration of Eugene J. Carella, Esq. and Paula Pfister, demonstrating prima facie the fraud committed by the trial court and People in the preparation of the trial evidence as reflected in the Certified Settled Statement settled by the trial court who was disqualified, the egregious abrogation of Appellant's constitutional due process and equal protection rights to have a complete transcript of trial evidence prepared at public expense and filed as part of the record to document his twenty-four (24) grounds on appeal; and a gross misapplicat and misapprehension of facts and law by the Appellate Departmen the members of which are the subject of vigorous disqualificati foreclosing further action and invalidating prior action who have in common enterprise with the trial judge excised and obstructed material evidence from Appellant's record on appeal, all of which summate to deny Appellant-Petitioner herein a fair trial, and constitutionally sufficient adjudicati on appeal. Appellant prays his Petition for Rehearing be granted and that the Appellate Department's judgment of February

1988 affirming tne judgment of the trial court be promptly vacated by a panel of this Court free from bias and prejudice against Petitioner and that the judgment of conviction be vacated post haste because of gross, irreparable and infirming injury and fraud carried out against Appellant, denying Appellant's fundamental right to due process and equal protection of law and a fair trial and fair adjudication on appeal.

Said petition is based on all papers, pleadings, declarations, and the like on file here -- together with memoranda of points and authorities and said further and additional evidence as may be adduced.

DATEAD: February 17, 1988

BY: EUGENE JOHN CARELLA, ESQ.
Appellant

EXHIBIT A

DECLARATION OF PAULA E. PFISTER

I, PAULA E. PFISTER, declare and state as follows:

1. That I reviewed the testimony alleged to have been furnished by me at the time of trial of Eugene J. Carella as represented in the Certified Settled Statement.

2. That the testimony I actually rendered at the trial has been significantly and substantially altered and the statements ascribed to me in the settled statement are not true and correct and are known to be inaccurate by the trial judge and District Attorney.

3. That at the time of trial I testified that I was physically with Mr. Carella on the late afternoon of May 11, 1985 when Mr. Carella physically visited the rental offices of MPG Car Rental at the intersection of Doheny and Wilshire Boulevard.

4. That I further testified that it was my knowledge that Mr. Carella had substantial monies with him when he went to the MPG Car Rental office and did for the purpose of making further and additional payment on his account.

5. That I further testified that MPG Car Rental Office and the Union 76 Service Station physically adjoin one with another and that Mr. Carella after not being able to locate anyone at MPG inquired at the Union 76 station if they knew

EXHIBIT "A"

where the MPG personnel were or if they could accept payment for them.

6. That I also testified that Mr. Carella also secured gas from the Union 76 at Doheny/Wilshire adjoining the MPG office after he could not find anyone and secured a receipt signed and stamped May 11, 1985, which receipt would not be permitted to be entered as evidence at the time of trial.

7. That I further testified that Mr. Carella was physically present and in Los Angeles and at the Century Wilshire Apartment location where he resided for a period of approximately two (2) years at all material times and for each and every night in 1984 and 1985, excepting a weekend visit to Palm Springs, and lived in the Los Angeles area and was prosecuting legal matters in the state and federal court located in Downtown Los Angeles regularly and had made various appearances in these courts during this time in question.

8. That I further state that while on the witness stand Mr. Carella showed me a copy of the receipt he received from the Union 76 service station dated May 11, 1985 which he sought to have me authenticate and souqht to introduce the receipt into evidence, but the court would not let him.

9. That I further state that I personally accompanied Mr. Carella on June 20, 1985 (one week before the false arrest) to the law offices of Roper & Polino located at 3255 Wilshire

Boulevard and attended a conference scheduled by Charles Woodmansee, a court-appointed referee (Jack Newman involuntarily appointed him), in litigation in which Mr. Carella and I were both plaintiffs, e.g., Eugene J. Carella, Esq., Paula Pfister v. Sheraton Corporation, LASC No. 516 399, where Mr. Carella and myself are suing for Unruh Civil Rights violations and false imprisonment, assault and batter charges and numerous other claims for damages and injunctive relief.

10. That I further state that I had personal knowledge that Mr. Carella also during the week of June 20, 1985, a few days before the false arrest, physically visited and met with Roscoe Jones, Director of the Federal EEOC (Equal Employment Opportunity Commission) in Los Angeles, located at 9255 Wilshire Boulevard, the same location of Roper & Polino, and filed a housing and employment discrimination charge with that office still pending with that Federal commission.

11. That I further state that I know that Mr. Carella on June 18, 1985 just nine (9) days before the subject false arrest was in the U. S. District Court for the Central District of California seeking to be heard on the question of $140,000 of attorney fees owed to him in litigation commenced against General Electric, Inc. and his attorney lien granted him by the district judge. This Court is located at 312 N. Spring Street, Los Angeles, California.

12. That Judge Judith Stein prevented Mr. Carella

from introducing evidence of any of these proceedings and/or to take mandatory judicial notice of them, even though Mr. Carella diligently sought to have such evidence introduced at the time of trial on March 17, 1986, and thereafter.

12. That I have specifically reviewed the settled statement certified by Judith Stein on August 17, 1987, and, in particular, the summary of my testimony. The testimony assigned to me is distorted and altered substantially, to wit: 1) I testified I traveled with Mr. Carella to MPG Rental office on the late afternoon of May 11, 1985, not the evening; 2) the statement that she knew that appellant had a large amount of cash on him at the time (May 11, 1985) is true, but the following statement..."she did not know that he was going to do with the money" is an outright lie and falsehood, and known to be such.

13. That I further specifically state that while on the witness chair I was harassed, intimidated and threatened by the trial judge Judith Stein and that she had also violated my rights when I was absent from the courtroom by having my person and purse searched over my protestation and when there was no reason for this conduct.

14. That I further state that the subject rental vehicle was put in a Century Wilshire parking space which was accessible to inspection each and every night in question, located at 10776 Wilshire Boulevard--a little more than a

mile from the MPG Car Rental offices.

15. That I further state that I was percipient to Mr. Carella's false arrest at the Century Wilshire Apartments in the early morning of June 27, 1985 when I heard Mr. Carella inform Detective Schwab that he had spoken to Jennifer Ayres of the Beverly Hills Police Department who advised him "that 'Schwab' was on an extended vacation."

16. That I am aware that Mr. Carella had gone to the Beverly Hills Municipal Court to see the court reporter Robert Marsh (September 1985) on the transcripts when he was ordered arrested again by Judith Stein to prevent him from obtaining the subject transcripts and documenting his appeal.

17. That I had filed a complaint with the Police Department of Inglewood and the District Attorney's office <u>just prior to the false arrest of Mr. Carella on the grand theft and conversion of all my property, files and possessions acquired over a twenty (20)+-year period and monies taken under false pretenses for the safekeeping of this property</u>. Mr. Carella's property, files and possessions and monies were also with this property that was converted/thefted.

18. That the Police Department and District Attorney's office refused to do anything about this matter, and shortly thereafter caused the false arrest of Mr. Carella for the same charges I lodged with them on the theft/conversion of

our property.

The foregoing statements are true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Anageles, California under penalty of perjury.

Paula Prister

EXHIBIT B

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follows:

1. That I am the appellant-petitioner herein.

2. That the foregoing declaration is made in support of my petition for rehearing and application for transfer to the Court of Appeal made alternatively on said petition.

3. That the subject rehearing petition is filed pursuant to Rule 107 of the Rules of Court.

4. That I further state the judgment of the Appellate Department is so grossly infected with constitutional infirmities, as is the trial judgment, that I am seeking and fully intend to seek appropriate intervention by the Court of Appeal and/or State Supreme Court and/or United States Supreme Court to have the subject fraudulent judgment vacated and thrown out because my constitutional rights to a fair trial and for hearing have been irreparably and irrevocably violated.

5. That I am accordingly requesting that this Court stay the issuance of remittitur consistent with Rule 144(c) of the Rules of Court should it not be disposed to grant the instant petition for rehearing to enable me sufficient time to have the constitutional injuries and infirmities complained of reviewed and redressed by a higher court.

6. That I specifically incorporate the declaration of

EXHIBIT "B"

Paula E. Pfister identified as EXHIBIT "A" and attached herewith as being recited in support of this declaration.

7. That the Appellate Department decision, the subject of the petition for rehearing, is grossly defective and constitutionally infirmed for the following reasons:

(a) It was rendered by Appellate Department judges who are disqualified and the subject of a disqualification for cause petition, requiring all orders, judgments and the like of said Appellate Department be vacated;

(b) It is infirmed because Appellant, who is financially indigent, has been deprived of his fundamental constitutional right to a Reporters Transcript of Trial Evidence furnished him and made a part of the Record on Appeal to document his twenty-four (24) grounds for appeal. (In Re Armstrong, 126 CA 3d 565, 128 CR 902 (1981);

(c) The settled statement certified by the trial court is a fraud, sham, nullity and not drawn in conformity with the Rules of Court or mandates of the Supreme Court of the State. (See, People v. Jenkins), and should be stricken.

(d) The memorandum judgment willfully mistates evidence and falsely indicates a waiver by Appellant of his const tutional right to a speedy trial which is in direct contradiction to what actually occurred at the pre-trial proceedings;

(e) The memorandum judgment consciously and willfully fails and refuses to consider and address each of the grounds for appeal set forth in the certified settled statement, each of which requires that the trial court judgment be vacated and thrown out as a matter of law;

(f) That the judgment misapprehends the law with respect to mandatory jury instructions and sua sponte instruction required to be made by the trial judge and further ignores the notice and demand requirements mandated by due process consideration before jury instructions on the presumption of Sections 484 and 10855 of the Penal Code and Vehicle Code can be given;

(g) The combination of the Appellate Department's conscious refusal to order the complete Reporters' Transcripts of Trial Evidence, at the same time it seeks to conclude that no evidence exists to document Appellant's grounds of appeal constitutes an actionable fraud on Appellant and taints the judgment.

8. That I specifically state that in January 1986 prior to the start of the actual trial proceedings, in open court before visiting Judge Morse I had the Court Reporter Douglas Weaver read his notes for the actual proceedings that occurred before Commissioner Murphy on June 27, 1985 and July 1, 1985. At that time, in open court, Mr. Weaver specifically stated that his notes for the subject days stated showed that Appellant "did NOT waive his right to a speedy trial" in response to

the Commissioner's direct questions of waiver.

9. That the court docket in this regard is obviously false, incorrect, and was to have been corrected by Robert Tauger, Clerk in Division 5, who was aware of the incorrect docket entry showing a 'waiver.'

10. The Appellate Department judgment is therefore infirmed because it is based on false and mistaken facts and the Reporters Transcripts will so verify.

11. That the Appellate Department judgment also failed to specifically address the gross error committed by the trial court by refusing to grant Appellant a pre-sentencing probation report, at the same time it immediately sentenced Appellant and refused to stay the sentencing and judgment pending his appeal in derogation of the laws of this State.

12. That I further state the Reporters Transcripts of Trial Proceedings demanded by me to be made a part of the Record demonstrate prima facie the validitiy of the twenty-four (24) grounds for appeal recited by me in my Proposed Settled Statement and command the judgment, the subject of this petition, and the underlying trial court judgment, be forthwith vacated. Accordingly, I specifically demand that the Reporters Transcripts be prepared and filed with this Court at public expense.

13. That two (2) salient grounds for appeal conspicuously

not addressed and omitted by the Appellate Department are the disqualification of the trial court moved by Appellant as reflected on the docket sheet which renders null and void all orders of the trial judge, and the gross acts of prosecutorial misconduct ranging from disparaging references of Appellant to the use of diagrams, charts and documents not authenticated or moved in evidence during the course of the trial.

14. That I advised the Appellate Department as far back as October 1986 that the trial judge, who is disqualified, had consciously interfered with and obstructed my rights to secure the Reporters Transcripts by having me falsely arrested after I was ordered by the Appellate Department to secure from the Court Reporter Marsh information concerning said Reporters Transcripts later.

15. That my right to secure the subject transcripts at public expense is a fundamental constitutional due process right which is essential to ensure me a fair trial and fair appellate adjudication of my rights on appeal.

16. That Judges Newman, Margolis, Robertson and Woods are disqualified from acting in these proceedings and I specifically demand a successor Appellate Department appointed in accordance with law be convened to adjudicate my appeal and all the grounds asserted therein on the basis of a complete and true record on appeal, including the Reporters Transcripts of Trial Proceedings and that they be preempted from acting further herein.

17. That I specifically incorporate my Motion and Demand for Reporters Transcripts at Public Expense, together with Exhibits filed with the Appellate Department on January 26, 1988 into the within declaration.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Angeles, California, under penalty of perjury.

EUGENE JOHN CARELLA, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
Statement of the Case

Appellant, a distinguished federal practitioner, was falsely arrested and imprisoned for the "theft" of a rental automobile he secured pursuant to a rental car contract and for which he paid valuable cash consideration in advance. Permission, consent and authorization were furnished to Appellant pursuant to the rental contract. The subject automobile was parked each and every night at Appellant's residence in Westwood located a little more than a mile from the MPG Car Rental offices and easily accessible and observable by MPG personnel.

Appellant has asserted that the entire trial proceedings constituted a nightmarish litany of egregious, heinous, and unprecedented judicial and constitutional abuses perpetrated by the trial judge, Judith Stein, who was hand-picked to falsely incarcerate Appellant to rig the jury pool and jury selection and to deprive Appellant of every major constitutional right and guarantee any American citizen should expect. To obscure and defense her complicity in the criminal racketeering conspiracy against Appellant, the trial judge, whose disqualification was sought by Appellant, has acted during the post-trial phase of the proceedings to frustrate the right of Appellant to secure and file the Reporters Transcript of Trial Proceedings evidencing the gargantuan constitutional irregularities inflicted upon Appellant at trial and subsequent thereto.

Prior to this appeal being scheduled for oral argument on January 28, 1988, on the basis of the financial indigency imposed upon Appellant as a result of these vexatious and false criminal proceedings, he moved this Court for a Reporters Transcript at public expense. Notwithstanding the automatic right to secure said transcripts guaranteed by the Constitution, the Appellate Department willfully denied said motion. (See, In Re Armstrong, supra.) Appellant had also previously sought to have a settled statement certified in accordance with the laws in this State. (See, People v. Jenkins, supra) which was also rebuffed by the Appellate Department.

Appellant, because of the enormous bias, prejudice, and animous manifested by the Appellate Department in securing the Reporters Transcript, and learning of this refusal on February 4, 1988, moved for the immediate disqualification of said Appellate Department, consisting of Judges Newman, Margolis, Woods, Robertson. After having moved for said disqualification of said Appellate Department judges, learned Appellant/ Appellate Department, while at the same time they consciously rebuffed Appellant's fundamental constitutional right to have a reporter's transcript of trial evidence filed to document his twenty-four (24) grounds on appeal, had concurrently rejected Appellant's appeal "on the merits," finding there to be "no evidence" to support Appellant's grounds on appeal. Further, said Appellate Department considered only two or three of the twenty-four (24) grounds for appeal recited by Appellant, notwithstanding that each of the grounds are meritorious

on their face. The order of the disqualified Appellate Department in its present format is a "virulent affront" to constitutional liberty in this country and unless corrected by rehearing and reconsideration constitutes a debauchery of constitutional jurisprudence and value which cripples our entire system of law.

To permit a corrupt trial judge to inflict such enormous constitutional deprivations upon Appellant at the time of trial is reprehensible; to have a specifically-selected Appellate Department acting in common enterprise with that trial judge to bury the evidence with the Appellant is a crime of the highest order.

AN APPELLATE DEPARTMENT CONSTITUTED IN ACCORDANCE WITH LAW MUST VACATE THE NON-FINAL JUDGMENT AND DIRECT REHEARING OF THE SUBJECT APPEAL TO ENSURE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Rule 107
California Rules of Court

III.

DISQUALIFIED APPELLATE JUDGES MUST VACATE ANY AND ALL ORDERS, JUDGMENTS, OR THE LIKE MADE OR RENDERED BY THEM PRIOR TO THEIR DISQUALIFICATION BEING RECORDED.

- 18 -

Section 170.3
California Rules of Court

IV.

FAILURE OF THE TRIAL COURT TO FURNISH APPELLANT A PRE-SENTENCING PROBATION HEARING UPON DEMAND, CONJOINED WITH HIS IMMEDIATE MISDEMEANOR SENTENCING ABRIDGES DUE PROCESS RIGHT TO A FAIR TRIAL AND IS PER SE REVERSIBLE ERROR.

Fourteenth Amendment
U. S. Constitution

V.

APPELLATE DEPARTMENT HAS MANDATORY OBLIGATION TO FURNISH INDIGENT APPELLANT WHO TIMELY DEMANDS REPORTERS TRANSCRIPTS OF TRIAL EVIDENCE AT PUBLIC EXPENSE AND WHO ASSERTS INSUFFICIENCY OF EVIDENCE, GROSS PROSECUTORIAL MISCONDUCT, AND [illegible] TRIAL COURT BIAS, PREJUDICE, AND DISCRIMINATION IN HIS GROUNDS FOR APPEAL, AND FAILURE OF WITH TRANSCRIPT APPELLATE DEPARTMENT TO SO ACT, CONSTITUTES FATAL ERROR, REQUIRING APPELLATE JUDGMENT AND UNDERLYING JUDGMENT BE THROWN OUT.

In Re Armstrong, supra.

VI.

APPELLATE DEPARTMENT JUDGMENT BASED ON FALSE, FRAUDULENT, AND INCORRECT DOCKET ENTRY, SHOWING WAIVER OF RIGHT TO SPEEDY TRIAL WHEN ACTUAL REPORTERS' TRANSCRIPTS OF ARRAIGNMENT PROCEEDINGS EVIDENCE NO WAIVER OF THESE RIGHTS

IS FLAWED AND MUST SUCCUMB ON REHEARING.

VII.

APPELLATE DEPARTMENT REFUSAL TO CONSIDER AND TO REVIEW AND RESPOND TO EACH OF APPELLANT'S GROUNDS FOR APPEAL (TWENTY-FOUR IN NUMBER), WHICH CONSTITUTE REVERSIBLE ERROR, ABUSE OF DISCRETION OR OTHERWISE INFIRM TRIAL COURT JUDGMENT, COMMANDS THAT THOSE GROUNDS NOT CONSIDERED BE REVIEWED AND REHEARD ON THE MERITS AND A PETITION FOR REHEARING OF THE APPEAL BE ORDERED.

People v. Jerkins, 55 CA 3d, Supp. 55 (1976)

VIII.

APPELLATE DEPARTMENT RELIANCE UPON A "CERTIFIED" SETTLED STATEMENT" SHOWN TO BE A CONSCIOUS FRAUD, MISSTATEMENT, AND PREVARICATION OF TESTIMONY AND OTHER EVIDENCE COMMITTED BY THE DISTRICT ATTORNEY ACTING IN COMBINATION WITH TRIAL JUDGE AND DISQUALIFIED/ APPELLATE JUDGES USED TO AFFIRM JUDGMENT IS PER SE GROUNDS FOR REHEARING, REQUIRING SAID PETITION FOR REHEARING BE GRANTED.

Rule 187, Rules of Court

IX.

APPELLATE DEPARTMENT MISAPPREHENSION OF DUE PROCESS REQUIREMENTS IN HEDRICK AND HEMMER MANDATES INVALIDATES JUDGMENT AND COMPELS REHEARING AND RECONSIDERATION AS A MATTER OF LAW.

- 20 - People v. Hemmer, 19 Cal.App. 3d 1052 (1971)
People v. Hedrick, 105 Cal App. 3d 166

CONCLUSION

FOR ALL THE FOREGOING REASONS, Appellant-Petitioner herein, respectfully prays that the Order entered February 3, 1988, appended as EXHIBIT "C", the subject of the Petition for Rehearing, be reheard and reconsidered.

Appellant further prays that the subject judgment in Appeal No. CRA 24001 after being reheard be forthwith vacated and that a new judgment be entered vacating and throwing out the trial court judgment fraudulently entered April 7, 1986 by Judith Stein because it is wrought with gross constitutional infirmities and judicial error. Alternatively, Appellant asks the judgment be reheard and the appeal be reinstated for hearing for such further and additional argument as may be required by a newly-constituted Appellate Department.

Moreover, should this Court not grant the instant petition, Appellant demands the Appellate Department certify a transfer of the subject appeal to the Court of Appeal in accordance with Rules 62, 63 of the Rules of Court to ensure uniformity of decisions and to protect the integrity of constitutional guarantees that exist in Appellant's favor heretofore evidenced herein. Appellant-Petitioner also respectfully prays that pursuant to Rule 144, the remittitur of the instant appeal be stayed until further order and until Appellant has exhausted his rights to secure intervention

from the Court of Appeal, Supreme Court for the State of California, and/or United States Supreme Court. Said request of stay of remittitur is being made in good faith to fully protect Appellant's fundamental due process guarantees and for such further and additional relief as the Court deems necessary and proper.

DATED: February 19, 1988

BY: _____
EUGENE J. CARELLA, ESQ.

EXHIBIT C

[MEMORANDUM JUDGMENT OMITTED]

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this the 18th day of February 1988 I servied a true copy of the foregoing Appellant's Petition for Rehearing and Application for Transfer; Declaration of Eugene John Carella; Declaration of Paula Pfister; Memorandum of Points and Authorities on all parties of record by first class mail, postage-prepaid, in Los Angeles, California, on the following:

IRA REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, California 90012

Judith Stein, Judge
Beverly Hills Municipal Court
9355 Burton Way
Beverly Hills, California 90210

Eugene J. Carella

SEP 20 1988

FILED

CRA 24001

FOLD HERE

IN THE MUNICIPAL COURT

OF [redacted] JUDICIAL DISTRICT

COUNTY OF LOS ANGELES

STATE OF CALIFORNIA

NO. M23675

VS. Eugene John Carella

JURY INSTRUCTIONS

☒ GIVEN

☐ REFUSED

FILED MAR 21 1986

S. E. SEIDLER CLERK

BY J. TAUGER DEPUTY CLERK

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

quested by People		Given as Requested		Refused	
quested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion			

Date 4/79

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Judge

.000/1

I

Duties of Judge and Jury

Ladies and Gentlemen of the Jury:

Now we come to that part of the trial where you will be instructed on the law.

Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors you have two duties to perform in order to reach a verdict. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The word "fact" means something that is proved directly or circumstantially by the evidence.

Your other duty is to apply the law to the facts as you determine them and in this way to reach your verdict.

It is my duty in these instructions to explain to you the law that applies to this case. You must accept and follow the law as I state it to you.

You must not be influenced by pity for a defendant or by prejudice against him.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/2

You must not be biased against the defendant because he has been arrested; charged with a crime or brought to trial. These facts are not evidence of his guilt.

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

II

Composition of Instructions

The instructions are to be considered as a whole and each individual instruction is to be considered in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

For simplicity, the masculine form of pronoun as used in the instructions applies equally to all persons.

III

Statements of Counsel, etc.

You must not consider any statement by either attorney as evidence. ~~If the attorneys have agreed~~ on the D

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

6.000/3

to any fact or if any fact has been admitted, that fact is proved.

You must not consider as evidence any offer of proof that was rejected or any evidence that was stricken out.

As to any question to which an objection was sustained you must not guess what the answer might have been.

You must not assume to be true any insinuation suggested by a question asked a witness.

IV

Direct and Circumstantial Evidence

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact.

Circumstantial evidence is evidence that proves a fact from which an inference of the existence of another fact may be drawn.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

000/4

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

16.000/5

Sufficiency of Circumstantial Evidence

A finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

5.000/6

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

000/7

VI

Admissions and Confessions

A statement made by a defendant other than at his trial may be either an admission or a confession.

An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

A confession is a statement by a defendant which discloses his intentional participation in the criminal act for which he is on trial and which discloses his guilt of that crime.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

Evidence of an oral admission or an oral confession of the defendant ought to be viewed with caution.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

000/8

[No person may be convicted of an offense unless there is some proof of each element of the offense independent of any admission made by him outside of his trial.

However, the identity of the person who committed the offense may be established by an admission.]

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/9

VII

Credibility of Witness

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony.

In determining the believability of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as: his conduct, attitude and manner while testifying; his capacity to hear or see that about which he testified and his ability to recollect or to relate such matters; whether or not there was any bias, interest or other motive for him not to tell the truth; [any statement previously made by him that was consistent with his testimony] [or,] [any statement previously made by him that was inconsistent with his testimony;] [his character for honesty or veracity or for dishonesty or untruthfulness;] [any admission by him that he did not tell the truth;] [his prior conviction of a felony].

If you believe that a witness willfully testified falsely as to a material fact, you should distrust the rest of his testimony and you may disregard all of his testimony.

5.000/10

However, you should bear in mind that discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that you should disbelieve the witness, because forgetting is common and innocent mistakes are not unusual. Two persons witnessing the same incident often see or hear it differently.

You also should consider whether any such discrepancy concerns an important fact or only a trivial detail.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/22

VIII

Weighing Conflicting Testimony

You should not decide any issue merely by counting the number of witnesses who have testified on the opposing sides.

The final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

6.000/12

IX

Sufficiency of Testimony of One Witness

[Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact required to be proved by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.]

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/13

X

Expert Testimony

[In determining the weight to be given to the opinion of any expert who has testified in this case, you should consider the qualifications and credibility of such expert and the reasons given for his opinion.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight, if any, to which you find it to be entitled.]

[If there was any conflict in the testimony of expert witnesses, you should consider their relative qualifications and credibility in weighing the opinion of one expert against that of another as well as the reasons given for each opinion and the facts upon which it was based.]

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

5.000/14

XI

Presumption of Innocence and Burden of Proof

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows:

It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

COMPLETE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

6.000/25

XIII

[General Intent]

[In the offense with which the defendant is charged [in Count _____] there must be a joint operation of act or conduct and criminal intent.

[A person acts intentionally does that which the law declares to be an offense, he is acting with criminal intent, even though he may not know that his conduct is unlawful, or even though he may not intend to violate the law.]

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

.000/16

XIV

[Specific Intent]

[In the offenses with which the defendant is charged [in Counts 1+2,] there must be a joint operation of act or conduct and the required specific intent and unless such specific intent so exists that offense is not committed.]

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

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XV

Take No Cue from Judge

I have not intended by anything I have said or done or by any question I may have asked to suggest what you should find the facts to be or that I believe or disbelieve any witness.

If anything I have said or done has seemed to suggest my opinion as to the facts, you will disregard it and form your own opinion.

XVI

Duty to Deliberate

When you start your deliberations, it is important that you avoid expressing a fixed opinion or a determination to hold out for a certain verdict.

Each of you must decide the case for yourself but should do so only after an open-minded discussion of the evidence and instructions with the other jurors.

Once you have reached a conclusion, you should not change it merely because other jurors disagree with you. However, if you become convinced you have reached a wrong conclusion, you should not hesitate to change it.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

5.000/18

You should remember in deciding this case, that you are not advocates or partisans for either side but that you are the impartial judges of the facts.

XVII

Avoid Considering a Penalty

In your deliberations, or in arriving at a verdict, you must not discuss or consider the subject of penalty or punishment. That is a matter which must not in any way affect your decision.

XVIII

Concluding Instruction

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all twelve jurors must agree to the decision [and to any finding you have been instructed to include in your verdict]. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this courtroom.

(g) Unlawful Taking of Automobile

24001

Analysis

	Inst.No.
Grand Theft of an Automobile (1979 Revision)	14.35
Vehicle Taking—Violation of Vehicle Code Section 10851 (1979 Revision)	14.36
Auto Taking—When Acts May Constitute Either of Two Crimes (1972 Revision)	14.37

FILED
FEB 09 1987
FRANK S. ZOLIN, COUNTY CLERK
BY S. MUSCHIT, DEPUTY

CALJIC 14.35 (1979 Revision)

GRAND THEFT OF AN AUTOMOBILE

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person who steals, takes or drives away the automobile of another with the specific intent to deprive him permanently of his property is guilty of the crime of grand theft of an automobile.

In order to prove the commission of such crime, each of the following elements must be proved:

1. That a person took or drove away the automobile belonging to another person, and

2. That when such person took or drove away the automobile he had the specific intent to deprive the owner permanently of his property.

USE NOTE

This instruction is limited to charge of theft of an automobile by larceny.

If charge is theft of an automobile by false pretenses (People v. McNear, 190 Cal.App.2d 541, 12 Cal.Rptr. 124), use Instruc-

tion 14.10 (1979 Revision) and other false pretenses instructions as necessary.

If charge is embezzlement of an automobile (People v. Swanson, 127 Cal.App.2d 658, 274 P.2d 229), use Instruction 14.07 (1979 Revision).

If charge is theft of an automobile by trick and device (People v. Reinschreiber, 141 Cal.App.2d 688, 297 P.2d 668), use Instruction 14.05 (1979 Revision).

If this instruction is given, Instruction 14.02 (1979 Revision) will be unnecessary.

COMMENT

Penal Code, §§ 484, 487(3); 1 Witkin, Calif.Crimes, § 370(b).

Library References:

West's Key No. Digests, Larceny ⇐23, 70(2), 72, 79

CALJIC 14.36 (1981 Revision)

VEHICLE TAKING—VIOLATION OF VEHICLE CODE SECTION 10851

[Defendant is charged in [Count 2 of] the information, with the commission of the crime of violation of Section 10851 of the Vehicle Code.]

Every person who drives or takes a vehicle not his own, without the consent of the owner, and with specific intent to deprive the owner either permanently or temporarily of his title to, or possession of, the vehicle, whether with or without intent to steal the same, is guilty of the crime of violation of Section 10851 of the Vehicle Code.

In order to prove the commission of [the] each of the following elements must be proved:

1. That a person took or drove a vehicle belonging to another person,

2. That the other person had not consented to such taking or driving of his vehicle, and

3. That when such person took or drove the vehicle he had the specific intent to deprive the owner either permanently or temporarily of his title to or possession of the vehicle.

USE NOTE

Use this instruction and not Instruction 14.35 (1979 Revision) when only charge is a violation of Vehicle Code, § 10851.

Joy riding (Penal Code, § 499b) is a lesser included offense to a violation of Vehicle Code, § 10851, and defendant is entitled to a sua sponte instruction to that effect. People v. James, 157 Cal.App.3d 381, 203 Cal.Rptr. 716.

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TION OF VEHICLE
10851

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14.35 (1979 Revision)
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COMMENT

Vehicle Code § 10851; 2 Witkin, Calif.Crimes, §§ 658-660; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 395-396.

To constitute a violation of Vehicle Code, § 10851, there must exist a specific intent to permanently or temporarily deprive the owner of title or possession of the vehicle. People v. Johnson, 191 Cal.App.2d 694, 13 Cal.Rptr. 1.

As to element of asportation, see 2 Witkin, op. cit. § 659. Twenty feet held adequate to constitute a taking. People v. White, 71 Cal.App.2d 524, 162 P.2d 862.

The necessary element of a taking or driving "without the consent of the owner" is not established by proof of fraudulently induced consent. People v. Cook, 228 Cal.App.2d 716, 39 Cal.Rptr. 802; People v. Donell, 82 Cal.App.3d 613, 108 Cal.Rptr. 232.

CALJIC 14.37 (1972 Revision)

AUTO TAKING—WHEN ACTS MAY CONSTITUTE EITHER OF TWO CRIMES

COMMENT

A violation of Penal Code, § 499b (taking vehicle to temporarily use) is a lesser included offense to a charge of violating Vehicle Code, § 10851 (taking vehicle with intent to temporarily or permanently deprive owner). People v. Thebout, 141 Cal.App.3d 1011, 190 Cal.Rptr. 754.

When a complaint charging a violation of Penal Code section 10851 also charges "a driving and taking" of a vehicle, a violation of Penal Code section 499b (joy riding) may be a lesser included offense and jury should be instructed sua sponte accordingly. People v. Barrick, 33 Cal.3d 115, 187 Cal.Rptr. 716, disapproving language in People v. Thomas, 58 Cal.2d 121, 23 Cal.Rptr. 161, 373 P.2d 97 to the contrary.

The rule in People v. Barrick, 33 Cal.3d 115, 187 Cal.Rptr. 716 is not retroactive. People v. Hicks, 147 Cal.App.3d 424, 195 Cal.Rptr. 127.

CALJIC 14.37 (1972 Revision)

AUTO TAKING—WHEN ACTS MAY CONSTITUTE EITHER OF TWO CRIMES

The unauthorized taking or depriving by one person of the automobile of another may, depending upon the facts, constitute either of two crimes.

The defendant is charged in Count 1 with grand theft. Every person who steals, takes or drives away the automobile of another with the specific intent to deprive the owner permanently of his property is guilty of grand theft regardless of the value of the automobile.

The defendant is charged in Count 2 with a violation of Section 10851 of the Vehicle Code which provides that any person who drives or takes a vehicle not his own without the consent of the owner thereof, and with the specific intent to steal permanently or temporarily deprive the owner of his title to or possession of such vehicle, is guilty of a public offense.

The distinction between the offenses is in the type of specific intent required:

1. To constitute the crime of grand theft there must be a specific intent to permanently deprive the owner of his property.

2. To constitute a violation of Vehicle Code Section 10851 there must be a specific intent to either permanently or temporarily deprive the owner of his title to or possession of the vehicle.

The defendant may be found not guilty of both counts. If you find him guilty as charged in either

of the two counts, you must find him not guilty of the other.

If you are convinced beyond a reasonable doubt that defendant is guilty of one of the two counts but you have a reasonable doubt as to which of the two counts defendant is guilty, it is your duty to find him guilty of a violation of Section 10851 of the Vehicle Code as charged in Count 2.

USE NOTE

This instruction is designed to be used when the information charges, in separate counts, grand theft of an automobile and a violation of Vehicle Code, § 10851.

COMMENT

2 Witkin, Calif.Crimes, § 658(c).

Where each offense is charged to have occurred at the same time, the accused can be convicted of but one of the offenses. People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321, certiorari denied Kehoe v. People of State of Cal., 338 U.S. 834, 70 S.Ct. 39, 94 L.Ed. 509.

A violation of Penal Code, § 499b (joy-ride statute) is not a lesser and necessarily included offense where the complaint charges defendant under Vehicle Code, § 10851 with the "taking" of the vehicle without the owner's consent "with the intent to deprive the owner of his possession". People v. Thomas, 58 Cal.2d 121, 23 Cal.Rptr. 161, 373 P.2d 97, appeal dismissed, certiorari denied 371 U.S. 231, 83 S.Ct. 327, 9 L.Ed.2d 495.

However, if the complaint charges a violation of Vehicle Code, § 10851, in terms only of "driving without the consent of the owner" and does not charge "a taking", then a violation of Penal Code, § 499b, could be found to be a lesser and necessarily included offense. People v. Marshall, 48 Cal.2d 394, 309 P.2d 456.

Library References:

West's Key No. Digests, Automobiles ⇨337 Larceny ⇨7(1), 7(3).

D. MISTAKE

Analysis

	Inst.No.
Ignorance or Mistake of Fact	4.35
Ignorance or Mistake of Law (1979 Revision)	4.36

CALJIC 4.35

IGNORANCE OR MISTAKE OF FACT

An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.

Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

USE NOTE

This instruction should be given if requested in a homicide prosecution where defendant's sole defense is that he did not know the gun was loaded. People v. Goodman, 8 Cal.App.3d 705, 87 Cal.Rptr. 665.

This instruction should not be given in a prosecution for receiving stolen property. People v. Ricketts, 7 Cal.App.3d 541, 86 Cal.Rptr. 647.

COMMENT

Penal Code, § 26 (Four), 1 Witkin, Calif.Crimes § 151.

As to what constitutes ignorance or mistake of fact, see People v. Vogel, 46 Cal.2d 798, 299 P.2d 850; People v. Stuart, 47 Cal.2d 167, 302 P.2d 5, 56 A.L.R.2d 705; People v. Hernandez, 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673, 8 A.L.R.3d 1092.

Library References:

West's Key No. Digests, Criminal Law ⇨33, 772(5, 6)

PART 14
CRIMES AGAINST PROPERTY

A. THEFT

(a) Forms of Theft

Analysis

Theft—Forms of ..... Inst.No.
14.00

CALJIC 14.00

THEFT—FORMS OF

The crime of theft may consist of (1) theft by larceny, (2) theft by trick and device, (3) theft by embezzlement, or (4) theft by false pretense.

COMMENT

Penal Code, § 484; 1 Witkin, Calif.Crimes § 365; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 249–251.

Library References:

West's Key No. Digests, Larceny ⇔1, 70(2), 70 et seq.

(c) Trick and Device

Analysis

Theft by Trick and Device—Defined (1979 Revision) ..... Inst. No. 14.05

CALJIC 14.05 (1979 Revision)

THEFT BY TRICK AND DEVICE—DEFINED

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person who obtains possession of personal property of another by means of false promises without intention to perform or by means of fraud, artifice, trick or device with the specific intent to deprive the owner permanently of his property, is guilty of the crime of theft by trick and device.

In order to prove the commission of theft by trick and device, each of the following elements must be proved:

1. That a person obtained possession of personal property of some value belonging to another person,

2. That such person obtained possession by making [a] false promise[s] which he had no intention of performing or by means of other fraud, artifice, trick or device,

3. That in surrendering possession of such property, the other person did not intend to transfer the ownership, and

4. That the person who obtained possession did so with the specific intent to deprive the other person permanently of his property.

COMMENT

1 Witkin, Calif.Crimes, § 377; Fricke-Alarcon, Calif.Crim. Law (11th ed.), pp. 278–281.

Library References:

West's Key No. Digests, Larceny ⇔14, 70(1, 2).

(d) Embezzlement

Analysis

	Inst.No.
Theft by Embezzlement—Defined (1979 Revision)	14.07
Embezzlement—Trustee May Be Agent for Owner	14.08

CALJIC 14.07 (1979 Revision)

THEFT BY EMBEZZLEMENT—DEFINED

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person to whom property has been entrusted who fraudulently appropriates such property to his own use or purpose, is guilty of the crime of theft by embezzlement.

In order to prove the commission of theft by embezzlement, each of the following elements must be proved:

1. That a relation of trust and confidence existed between two persons,

2. That pursuant to such relationship one of those persons accepted property entrusted to him by the other person, and

3. That with the specific intent to deprive the other person of his property, the person fraudulently appropriated or converted it to his own use or purpose.

USE NOTE

When this instruction is given, an appropriate instruction (Instructions 14.21–14.24) as to distinction between grand and petty

theft and the duty of the jury to fix the degree must be given (Instruction 14.20).

Where defendant is charged with embezzlement, if it appears that he relies on the defense of openly and avowedly appropriating the property under a claim of title preferred in good faith (Penal Code, § 511), the court must give, sua sponte, a correct instruction of that defense. People v. Stewart, 16 Cal.3d 133, 127 Cal.Rptr. 117, 544 P.2d 1317.

COMMENT

Penal Code, §§ 484, 503, 506; 1 Witkin, Calif.Crimes, §§ 287-392; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 261-272.

A partner may be found guilty of embezzling partnership property. People v. Sobiek, 30 Cal.App.3d 458, 106 Cal.Rptr. 519, certiorari denied 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed.2d 104.

Library References:

West's Key No. Digests, Embezzlement ⇔4, 46.

★ CALJIC 14.08

EMBEZZLEMENT—TRUSTOR MAY BE AGENT FOR OWNER

If you find that money or property was entrusted to the defendant, and thereafter was fraudulently appropriated by him, it is immaterial whether such money or property was entrusted to the defendant by the owner directly or by a third person acting for the owner.

COMMENT

People v. Walker, 144 Cal. 1, 77 P. 705.

Library References:

West's Key No. Digests, Embezzlement ⇐48(3).

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(f) Degrees of Theft

Analysis

Grand and Petty Theft—When Distinction Depends on Value ($400, Point of Demarcation) (1983 Revision) 14.21
Grand and Petty Theft—When Distinction Depends on Value ($100, Point of Demarcation) (1983 Revision) 14.22
Grand and Petty Theft—Theft by Agent, etc., Over $400, in Twelve-Month Period (1983 Revision) 14.25

CALJIC 14.21 (1983 Revision)

GRAND AND PETTY THEFT—WHEN DISTINCTION DEPENDS ON VALUE ($400, POINT OF DEMARCATION)

When property such as that alleged to be involved in this case is taken by theft, if the value of the property exceeds four hundred dollars, the crime is grand theft; if the value is four hundred dollars or less, the crime is petty theft.

[When labor is obtained by theft, if the value of the labor exceeds four hundred dollars, the crime is grand theft; if the value is four hundred dollars or less, the crime is petty theft.]

USE NOTE

This is a general instruction and applies to theft of money, labor or real or personal property not otherwise specifically referred to in Penal Code, § 487, after the first clause or in Penal Code, §§ 487a, 487b and 487d.

COMMENT

Penal Code, § 487(1); 1 Witkin, Calif. Crimes, § 368; Fricke-Alarcon, Calif. Crim. Law (11th ed.), p. 252.

The 1983 Revision of CALJIC 14.21 incorporates the 1982 amendment of Penal Code, § 487.

The 1982 amendment (Stats.1982, ch. 80) was not intended to be retroactive. Stats.1982, ch. 935.

5

People's Special Instruction #1

Requested by People	X	Given as Requested		Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion			

Judge

Presumption Respecting Theft by Fraud

Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Penal Code Section 484 (b)

People's Special Instruction #2

Requested by People	X	Given as Requested		Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion			

Judge

Presumption Respecting Embezzlement of a Leased or Rented Vehicle

Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Vehicle Code Section 10855

People's Special Instruction #3

Requested by People	X	Given as Requested		Refused
Requested by Defendant		Given as Modified		Withdrawn
		Given on Court's Motion		

Judge

Manifestation of Intent

The intent or intention is manifested by the circumstances connected with the offense.

Penal Code Section 21 (a)

Intention to defraud: sufficiency

Whenever an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, ~~or body politic~~ or corporate, whatever.

Penal Code Section 8